SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

No. 376

COMMISSIONER OF INTERNAL REVENUE,
PETITIONER,

vs.

MOSE DUBERSTEIN, ET AL.,

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

INDEX

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IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 13646

MOSE DUBERSTEIN AND SYLVIA DUBERSTEIN, Husband and Wife (Petitioners), APPELLANTS,

v.

COMMISSIONER OF INTERNAL REVENUE, APPELLEE.

Appendix to Petitioners' Brief—Filed July 31, 1958

(File endorsement omitted)

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1 IN THE TAX COURT OF THE UNITED STATES

Docket No. 59877

MOSE DUBERSTEIN and SYLVIA DUBERSTEIN, Husband and Wife, *Petitioner*,

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*.

Docket Entries

1955

Oct. 17—Petition received and filed. Taxpayer notified. Fee paid.
Oct. 18—Copy of petition served on General Counsel.
Nov. 18—Answer filed by respondent.
Nov. 18—Request for hearing in Cincinnati filed by respondent.
Nov. 22—Notice issued placing proceeding on Cincinnati calendar. Service of answer and request made.

1956

June 21—Hearing set Sept. 17, 1956, Cincinnati.
Sept. 17 & 26—Hearing had before Judge Tietjens on Petitioners' motion for continuance. Motion granted. Filed at hearing: Petitioners' motion for continuance (served); copy of letter of Petitioners' counsel, S. G. Kusworm, 9/13/50.

1957

Mar. 7—Hearing set April 29, 1957, Cincinnati.
May 3—Trial had before Judge LeMire on merits. Petitioners' brief filed at hearing, served. Petitioners' brief due 6/18/57. Respondent's brief due 7/18/57. Petitioners' reply due 8/7/57.
2 May 21—Transcript of hearing 5/3/57 filed.
July 18—Respondent's brief in answer filed. Served 7/19/57.
July 29—Motion for extension of time to Sept. 18, 1957, to file reply brief, filed by Petitioner. 7/29/57 granted.
July 30—Motion of July 29 served.
Sept. 17—Reply brief for Petitioners filed. Served 9/18/57.

1958

Jan. 17—Memorandum findings of fact and opinion filed, LeMire, J. Decision will be entered for Respondent. Served 1/17/58.

Jan. 20—Decision entered, Judge C. P. LeMire. Served 1/21/58.

April 15—Bond in the amount of $5,140.96 approved and filed.

April 15—Petition for review by U. S. Court of Appeals, 6th District, filed by Petitioners.

April 15—Proof of service filed.

May 5—Order extending time for filing the record on review and docketing the petition for review to July 14, 1958, entered.

IN THE TAX COURT OF THE UNITED STATES

Petition—Filed October 17, 1955

The above-named Petitioners hereby petition for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (bureau symbols RC:CIN:AP:Cin:EJM) dated August 26, 1955, and as a basis of their proceeding allege as follows:

1. The Petitioners are individuals, and husband and wife, with their present address at 1429 Bryn Mawr Drive, Dayton, Ohio. The return for the period here involved was filed with the Director for the Cincinnati, Ohio district.

2. The notice of deficiency and statement (a copy of which is attached and marked Exhibit A) was mailed to the Petitioners on August 26, 1955.

3. The taxes in controversy are income taxes for the calendar year ended December 31, 1951, and is in the amount of $2,570.48, representing the deficiency as set forth in Exhibit A.

4. The determination of the tax set forth in the said notice of deficiency is based upon the following errors:

(a) The determination of the Commissioner that the Cadillac automobile received by Mose Duberstein from Mohawk Metal Corporation in 1951 constitutes taxable compensation for personal services in the amount of $4,250.00 is erroneous.

(b) The Commissioner's disallowance of medical expenses in the amount of $212.50 is erroneous.

5. The facts upon which the Petitioners rely as the basis for this proceeding are as follows:

(a) Mr. Mose Duberstein received said Cadillac purely and solely as a gift; there were never any business transactions between Mr. Duberstein and Mohawk Metal Corporation; there was never any obligation of any kind on the part of Mohawk Metal Corporation to pay Mr. Duberstein anything; he was told at the time he received the Cadillac that said Cadillac was being delivered as a gift; and any information given by Mose Duberstein to Mr. Morris Berman, President of Mohawk Metal Corporation was given purely as a personal favor without any hope or expectation of profit or gain.

(b) The determination of the Commissioner, disallowing medical expenses in the amount of $212.50 is erroneous, because said disallowance is a result of the increased income erroneously added to petitioners' income by the Commissioner for the year 1951.

WHEREFORE, the Petitioners pray that this court may hear this proceeding, and determine that there is no deficiency due from Petitioners as set forth in the aforesaid notice of deficiency dated August 26, 1955.

/s/ Sidney G. Kusworm, Sr.
SIDNEY G. KUSWORM, SR.,
Attorney for Petitioners,
Mose Duberstein and
Sylvia Duberstein.
403 Keith Building,
Dayton 2, Ohio.

Duly sworn to by Mose Duberstein and Sylvia Duberstein jurats omitted in printing.

5

Exhibit "A" to Petition

U. S. TREASURY DEPARTMENT
OFFICE OF THE REGIONAL COMMISSIONER
INTERNAL REVENUE SERVICE

Appellate Division
5th Floor, Faller Building,
106 E. Eighth Street
Cincinnati, Ohio

RC:CIN:AP
Cin:EJM

August 26, 1955

Mr. Mose Duberstein and Mrs. Sylvia Duberstein
Husband and Wife
953 Washington Street
Dayton 7, Ohio

Dear Mr. and Mrs. Duberstein:

You are advised that the determination of your income tax liability for the taxable year ended December 31, 1951 discloses a deficiency in tax of $2,570.48, as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency mentioned.

Within 90 days from the date of the mailing of this letter you may file a petition with The Tax Court of the United States, at its principal address, Washington 4, D. C., for a redetermination of the deficiency. In counting the 90 days you may not exclude any day unless the 90th day is a Saturday, Sunday, or legal holiday in the District of Columbia, in which event that day is not counted as the 90th day. Otherwise Saturdays, Sundays, and legal holidays are to be counted in computing the 90-day period.

6 Should you not desire to file a petition you are requested to execute the enclosed form and forward it to the Regional Commissioner of Internal Revenue, Appellate Division, Fifth Floor, Faller Building, 106 East Eighth Street, Cincinnati 2, Ohio. The signing and filing of this form will expedite the closing of your return by permitting an early assessment of the deficiency, and will prevent the accumulation of interest, since the interest period terminates 30 days after

receipt of the form, or on the date of assessment, or on the date of payment, whichever is earlier.

Very truly yours,

T. COLEMAN ANDREWS,
Commissioner,

By (signed) ROBERT S. DECHANT,
Robert S. Dechant,
Associate Chief, Appellate
Cincinnati Region.

Enclosures:

Statement
IRS Publication No. 160
Agreement Form

NOTE: The execution and filing of this form at the address shown in the accompanying letter will expedite the adjustment of your tax liability as indicated above. It is not, however, a final closing agreement under section 3760 of the Internal Revenue Code, and does not, therefore, preclude the assertion of a deficiency or a further deficiency in the manner provided by law should it subsequently be determined that additional tax is due, nor does it extend the statutory period of limitation for refund, assessment, or collection of the tax.

If executed with respect to a year for which a JOINT RETURN OF A HUSBAND AND WIFE was filed, this form must be signed by both spouse, acting under a power of attorney, signs as agent for the other.

Where the taxpayer is a corporation, the form shall be signed with the corporate name, followed by the signature and title of such officer or officers of the corporation as are empowered to sign for the corporation, in addition to which the seal of the corporation must be affixed.

7 Form 870 (1953)
U. S. Treasury Dept.
Internal Revenue Service

In re: Mose Duberstein and Sylvia Duberstein
953 Washington
Dayton, Ohio

WAIVER OF RESTRICTIONS ON ASSESSMENT AND COLLECTION OF DEFICIENCY OF TAX AND ACCEPTANCE OF OVERASSESSMENT

RC:CIN:AP
Cin:EJM

Pursuant to Section 272 (d) of the Internal Revenue Code or corresponding provisions of prior internal revenue laws, the restrictions provided in section 272 (a) of the Internal Revenue Code or corresponding provisions of prior internal revenue laws are hereby waived and consent is given to the assessment and collection of the following deficiencies, together with interest on the tax as provided by law; and the following overassessments are accepted as correct:

DEFICIENCIES

TYPE OF TAX	YEAR ENDED	TAX	PENALTY	TOTAL
Income	Dec. 31, 1951	$2,570.48		$2,570.48

OVERASSESSMENTS

_____
MOSE DUBERSTEIN (*Taxpayer*)

_____
SYLVIA DUBERSTEIN (*Taxpayer*)

_____
(*Address*)

By _____ _____
Date

SEAL

STATEMENT

Mr. Mose Duberstein and Mrs. Sylvia Duberstein
Husband and Wife
953 Washington Street
Dayton, Ohio

Income Tax Liability for the Taxable Year Ended December 31, 1951

YEAR	DEFICIENCY
1951	$2,570.48

In making this determination of your income tax liability, careful consideration has been given to the report of examination dated March 1, 1955; to your protest dated March 30, 1955; and to the statements made at the conferences held on September 25, 1954, October 14, 1954, and May 17, 1955.

A copy of this letter and statement has been mailed to your representative, Mr. David E. Flagel, 328 Third National Building, Dayton 2, Ohio, in accordance with the authority contained in the power of attorney executed by you.

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Adjustments to Net Income
Year Ended December 31, 1951

Net income disclosed by return	$42,832.50
Unallowable deductions and additional income:	
(a) Other income	4,250.00
(b) Medical expenses	212.50
Net income adjusted	$47,295.00

Explanation of Adjustments to Net Income

(a) It is held that the cadillac automobile, valued at $4,250.00, received by you during the year 1951, from the Mohawk Metal Corporation constitutes taxable income as compensation for personal services, within the purview of section 22(a) of the Internal Revenue Code of 1939.

(b) Your claimed medical expenses have been disallowed in the amount of $212.50 in accordance with the provisions of section 23(x) of the Internal Revenue Code of 1939.

Computation of Income Tax
Year Ended December 31, 1951

Net income adjusted	$47,295.00
Less: Exemptions	2,400.00
Taxable net income	$44,895.00
One-half of taxable net income	$22,447.50
Normal tax, 3% of $22,447.50	673.42
Surtax on $22,447.50	8,131.08
Combined normal tax and surtax	$ 8,804.50
Income tax liability (2 × $8,804.50)	$17,609.00
Income tax liability disclosed by original return, account no. BF 6820	$15,038.52
Deficiency	$ 2,570.48

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10 IN THE TAX COURT OF THE UNITED STATES

Answer—Filed November 18, 1955

Comes Now the Commissioner of Internal Revenue by his attorney, John Potts Barnes, Chief Counsel, Internal Revenue Service, and for answer to the petition filed herein, admits, denies and alleges as follows:

1 to 3, inclusive. Admits the allegations of paragraphs 1 to 3, inclusive, of the petition.

4, (a) and (b). Denies the allegations of paragraph 4, (a) and (b) of the petition.

5, (a) and (b). Denies the allegations of paragraph 5, (a) and (b) of the petition.

6. Denies generally each and every allegation of the petition not hereinbefore specifically admitted, qualified or denied.

WHEREFORE, it is prayed that the petition be denied and that respondent's determination be in all respects approved.

(Signed) JOHN POTTS BARNES,
Chief Counsel
Internal Revenue Service.

Of Counsel:

CLARENCE E. PRICE,
Regional Counsel,

GENE W. REARDON,
Assistant Regional Counsel,

JOHN J. LARKIN,
Attorney, Internal Revenue Service.

TRANSCRIPT OF PROCEEDINGS

Colloquy Between Court and Counsel

The Clerk: At this time we will call Docket No. 59877, Mose Duberstein and Sylvia Duberstein.

Will you state your appearances for the record, please?

Mr. Blitz: James D. Blitz for the Respondent.

The Clerk: For the Petitioner.

Mr. Kusworm: Sidney G. Kusworm, Sr., for the Petitioner.

The Clerk: Address?

Mr. Kusworm: 403 Keith Building, Dayton, Ohio. And we are ready for trial.

The Court: Very well, gentlemen. You may give a brief statement.

Mr. Kusworm: I beg your pardon?

The Court: I would like to have a brief statement of facts and issues in this case from each of the parties. You may proceed.

Mr. Kusworm: If Your Honor pleases, this case comes before the Court on a petition of the Petitioners for a redetermination of the deficiency set forth by the Commissioner in his Notice of Deficiency, dated August 26, 1955.

As a basis of their proceeding, the Petitioners allege that they are husband and wife. The amount of taxes involved

is $2,570.48. And that the errors of the Commissioner were as follows:

The determination of the Commissioner that the Cadillac automobile received by Mose Duberstein from Mohawk Metal Corporation in 1951 constitutes taxable compensation for personal services in the amount of $4,250.00. And then there's an item of medical expenses, which we are not questioning. The Commissioner has stated that to be in the amount of $212.50.

The Court: You are now conceding that is erroneous?

Mr. Kusworm: We are willing to concede that.

The Court: Very well.

Mr. Kusworm: Mose Duberstein received a Cadillac purely and solely as a gift. There was never any business transaction between him and Mohawk. There were never any obligations of any kind on the part of Mohawk to pay him anything. He was told at the time he received the Cadillac that it was being delivered as a gift, and any information given by Duberstein to Mr. Morris Berman, who is the president of Mohawk, was given purely as a personal favor without any hope or expectation of profit or gain.

Now, if Your Honor pleases, we submit to the Court that no form No. 1099 was ever sent to Duberstein in February of 1952 showing the value of the Cadillac as compensation to him. The evidence will show that if he had received it, he would have turned it over to his accountant, David E. Flagel, a C.P.A., who will testify in this case. He would have turned it over to him immediately, which is his usual custom whenever such a notice is delivered to him. If he had known, and had been aware at the time the automobile was considered as compensation, he would have immediately gotten in touch with Berman and straightened the matter out, since Duberstein at no time considered this as compensation.

As a matter of fact, Your Honor, all that happened was this: The Duberstein Iron & Metal Company and the Mohawk Metal Company did business together for four years, most of it over the telephone, as is the custom of the trade. And one day Berman in his conversation with Duberstein on some matters referring to the Duberstein Iron & Metal

Company asked him if he knew of anybody that would be in the market to buy some certain kinds of materials
13 that Duberstein didn't handle, and Duberstein said he didn't know but he might contact the people whose names he mentioned. That's all there was to it.

And the first information that Duberstein had about the matter being taxable was in 1954, when a representative of the Internal Revenue at Dayton requested to see him, and inquired of him about the automobile, and stated that in the opinion of the Government it was taxable.

At that time Duberstein told the agent of the transaction. I am not going to argue the law which is set forth in the brief, because I don't think this is the place for it. But I'd like to say this to Your Honor—When in 1955 out of a clear sky Duberstein, as an individual, and all the business transactions were with the company, if this was a gift it should have been a gift to the company. It wasn't a gift to anybody. Flagel contacted Gorin who was the agent for Mohawk in that he was their C.P.A. Gorin said that as far as he was concerned he didn't know how to handle the matter, Berman was in Europe. Gorin called him and told Berman that he didn't know how to put it on the books, and Berman said, "Well, what do you think about it?" He said, "Well, if it's a gift," he said, "It isn't taxable if it isn't a gift; it's taxable to Duberstein if it's a gift. How will I put it on the books?" He said, "Put it on the books as a finder's fee." And that's the way it got on the books. And that's how this case came up in 1954.

Numerous letters were written by registered mail to Berman, to Gorin, copies of which will be presented to the Court at the proper time, none of which were answered.

We claim, if Your Honor pleases, that this is a case in which Duberstein Iron & Metal Company, no Duberstein, either owes $2,540.00 or they don't owe anything, and that's the reason the case hasn't been settled. I was prac-
14 ticing in this Tax Court for many many years, and it is the first case I've ever tried because I always believe in settling cases. But this kind of case cannot be settled. It's either the whole hog or none.

That's our case.

The Court: Very well.

Mr. Biltz: It is the Respondent's contention that infor-

mation was furnished to Mohawk Metal by Mr. Duberstein, and that this information proved to be very valuable to the Mohawk corporation, and that for this reason they compensated Mr. Duberstein with this Cadillac, and that the Government, the Respondent has treated this as taxable income, as compensation for services, and the basis of this was because there was complete lack of intent of the donor in this case to make a gift.

The Court: Very well. You may call your first witness.

Mr. Kusworm: I call Mose Duberstein.

Mose Duberstein.

called as a witness for and on behalf of the Petitioner, having been first duly sworn, was examined and testified as follows:

Direct Examination

The Clerk: May we have your name and address, please, sir?

The Witness: Mose Duberstein; 951 Washington Street, Dayton, Ohio.

The Court: Mr. Duberstein, it is hard to hear in here. The acoustics are a little bad. If you will, speak up as loud as you can so the Court can hear you.

The Witness: I will try to.

By Mr. Kusworm:

15 Q. Mr. Duberstein, state whether or not you are the president of the Duberstein Iron & Metal Company, an Ohio corporation located at Dayton, Ohio? And talk loud so that His Honor can hear you. A. I am.

Q. That isn't very loud. How long have you been the president? A. For 25 years.

Q. Mr. Duberstein, state whether or not your company had during the years 1950 and '51, and prior thereto, business dealings with the Mohawk Metal Corporation? A. Yes, we did.

Q. And what were those business transactions? A. The business transactions with the Mohawk Metal Company were strictly on the basis—

Q. Well, buying and selling what? A. Buying and selling copper, or various other metals.

Q. Now, state whether or not most of these transactions were done by phone? A. All of them, practically.

Q. Did you know Mr. Berman personally? A. Yes, I did.

Q. And how long did you know him, or have you known him? A. I'd say about 7 years.

Q. Now, state whether or not it is a fact that occasionally when you talked to him he would ask you questions about the names of consumers who used certain chemicals, and that if you knew the names of such consumers you'd give them to him? A. That's right. I did.

What were the type of materials, or chemicals that he asked you about? A. Oh, one was plexiglas, and another was polyethylene, nickel salts.

Q. Now, state whether or not this information was given to him gratuitously and without any hope of monetary reward or gift of any kind? A. I expected nothing in return.

16 Q. Talk up. A. I expected nothing in return for—

Q. Now, back in 1951 state whether or not Berman called you with reference to a Cadillac automobile? A. He did and I told him at the time that—

Mr. Biltz: Objection, Your Honor. That is hearsay conversation with Mr. Berman.

By Mr. Kusworm:

Q. State what you said to Mr. Berman, and what Berman said to you.

Mr. Biltz: Objection.

Mr. Kusworm: We think this is very competent.

The Court: The objection is overruled at this time. If I find it is incompetent I can always ignore it.

A. He [Morris Berman] told me that due to the fact that I—the information that I had given him was so helpful, that he felt that he wanted to give me a present. And I told him he didn't owe me anything. And he said, well, he had a Cadillac car as a gift, and I should send to New York to receive it, which I finally did. But I told him he owed me nothing, and I didn't expect anything for the information, and I didn't intend to be compensated but he insisted that I accept this Cadillac car.

By Mr. Kusworm:

Q. Now, at the time, did you need any automobile? A. No; I had two cars.

Q. What kind? A. I had a Cadillac, and an Oldsmobile.

Q. State whether or not at any time you or any member of your company to your knowledge received from Mohawk or it's auditor or certified public accountant a form No. 1099? A. I never received it.

Q. Showing this transaction. A. Not at all.

Q. Now, what was your custom, and is your custom when any form 1099, or any other forms concerning
17 taxes are sent to your company, or to you by the Government? A. Well, they are immediately turned over, or mailed directly to the auditor, and he handles it from there on.

Q. Had you received form 1099 in 1952 state whether or not you would have contacted Berman immediately? A. Oh, I definitely would.

Q. Why? A. Because I didn't owe anything, any money. This car was strictly a gift, and I would have tried to straighten out the matter with him. Or if I had received that form 1099.

Mr. Kusworm: You may cross-examine.

Cross-Examination

By Mr. Biltz:

Q. Mr. Duberstein, this information, I believe you testified, proved valuable to Mohawk. Is that correct? That you furnished them in 1951? A. It was a matter of information. He asked me for information as to where he could dispose of that type of material.

Q. Had you not given him this information would you still have gotten this Cadillac car? A. Oh, I don't—

Q. You don't think so? A. I don't think so.

Q. No. I don't think so either. Do you know anything about how Mohawk treated this item on their income tax return, or— A. I have no knowledge of that.

Q. You have no knowledge of that. A. No.

Q. Do you have any knowledge of anything with reference to the corporate minutes of the Mohawk Metal Company? A. Not at all.

Q. You made no attempt even after the investigation to find out whether this was income or a gift; is that correct?

Mr. Kusworm: Object.

A. I didn't know that information until 1954.

By Mr. Biltz:

Q. '54? A. Until the Internal Revenue Department contacted me.

Q. What is a form 1099, do you know? A. I'm not too familiar with it.

Q. You are not familiar with it. A. No.

Mr. Biltz: That is all.

Redirect Examination

By Mr. Kusworm:

Q. State whether or not you ever got any form from anybody showing a tax indebtedness to the Government because of a gift? A. No, I never did.

Q. Now, state whether or not after you got this information you contacted Mr. Flagel, and whether or not to your knowledge he made an investigation as you have been interrogated about by the distinguished attorney for the Respondent? A. Well, after I was contacted by the Internal Revenue Department I contacted Mr. Flagel, and he handled the matter from there on in, and he contacted the auditor of the Mohawk Metal Company.

The Court: Who is Mr. Flagel?

The Witness: He's our auditor. He's my C.P.A.

The Court: He's your auditor.

The Witness: That is right.

The Court: Accountant.

The Witness: Our accountant, that's right.

The Court: Very well.

Mr. Kusworm: That's all, Mr. Dubberstein.

(Witness excused.)

Mr. Kusworm: I call Mr. Flagel.

19 **David E. Flagel.**

called as a witness for and on behalf of the Petitioner, having been first duly sworn, was examined and testified as follows:

The Clerk: May we have your name and address, please?

The Witness: David E. Flagel.
The Clerk: Your address?
The Witness: 327 First National Building, Dayton, Ohio.

Direct Examination

By Mr. Kusworm:

Q. Mr. Flagel, you are a Certified Public Accountant with offices in the First National Bank Building at Dayton, Ohio? A. Yes, sir.

Q. Now, you have to talk loud. The Judge has told you the acoustics here are bad. A. Yes, sir.

Mr. Kusworm: I happen to know that myself, Your Honor, from previous experience.

By Mr. Kusworm:

Q. How long have you been a Certified Public Accountant? A. Since 1936.

Q. State when Mose Duberstein of the Duberstein Iron & Metal Company first contacted you about the automobile in question. A. Sometime during 1954.

Q. State whether or not you were ever given by Mose Duberstein or the Duberstein Iron & Metal Company a form 1099? A. No.

Q. State what the custom is of Duberstein Iron & Metal Company and or Duberstein with reference to turning such notices over to you. A. He usually turns over to me all papers or matters pertaining to taxes so that I can take care of them from that point on.

20 Q. Now, in 19—

The Court: Just a minute. You take care of the tax accounts and returns of both the corporation and Mr. Duberstein individually?

The Witness: Yes, sir; for the corporation and for all of the personal returns.

The Court: Very well. Very well.

By Mr. Kusworm:

Q. Now, Mr. Flagel, when this matter was reported to you by Duberstein and or the Duberstein Iron & Metal Company, state what you did with reference to getting the story of the transaction from Mose Duberstein. A. Well, first—

Mr. Riltz: From Mose Duberstein?

Mr. Kusworm: Yes.

Mr. Biltz: I object, Your Honor. Those would be self-serving declarations.

Mr. Kusworm: I'm asking what he did.

The Court: I understand that; I understand he will go ahead and give me the whole picture. State what you did in regard to Mr. Duberstein.

A. (Continued) Well, I discussed the matter first with Mr. Duberstein to get the whole story from him before discussing it further with the agent, with the internal revenue agent.

By Mr. Kusworm:

Q. Now, what did Duberstein tell you? A. He explained that the automobile was unquestionably a gift, and one of the questions which I asked was whether he had ever received any information on form 1099 or any other information. Mr. Duberstein explained to me that he had talked to Mr. Berman many times during the interim between '51 and '54, and the question of compensation or taxability of the Cadillac had never arisen.

21 The Court: Now, then, after that did you contact Mr. Berman, or Mohawk in regard to it?

The Witness: Yes, sir.

Mr. Kusworm: I am coming to that.

A. (Continued) I wrote a letter to Mr. Berman—

By Mr. Kusworm:

Q. Now, in answer to His Honor's questions I want you to read a letter. State whether you sent it by registered mail to Mr. Berman, and exactly word for word let the record show what that letter contained. A. Well, first I'd like to mention—Well, all right.

I wrote a letter on May 4th, 1954, and sent it to Mr. Morris Berman, 30 West 90th Street, New York, and it was sent special—it was sent registered.

Q. Have you got the receipt? A. We have the receipt for it.

Q. Read it. A. "Dear Mr. Berman: Mr. Mose Duberstein, who has been my client for many years, suggested that I write to you in connection with the audit by the

Internal Revenue Department of his 1951 personal Federal income tax return.

"The agent making the examination has the information from the New York office to the effect that the Mohawk Metal Corporation paid Mose Duberstein $4,250.00 during the year 1951 in the form of a Cadillac automobile, and deducted this item as an expense.

"In order to verify this, I corresponded directly with your accountant, Mr. Seymour Gorin, in Philadelphia. On May 1, 1954 he advised me that the Mohawk Metal Corporation did deduct this item as an expense on its Federal income tax return for that year. Also, that an information return on form 1099 was filed reporting this payment as income to Mose Duberstein. Mr. Gorin also gave me
22 an excerpt of a letter which was given by Mohawk to the Internal Revenue Department in New York on September 9, 1953 stating that this payment was made to Mose Duberstein in the nature of a finder's fee.

"I have discussed this matter at great length with Mose Duberstein and he has assured me that it was his definite understanding and your understanding, also, that this car was given to him strictly as a gift. He at no time considered himself as employed by Mohawk, had no agreement for compensation, and there was never any legal liability to pay him. As a matter of fact, he would not have considered accepting the car under any circumstances other than as a gift. On the basis of compensation he would incur a very substantial tax liability. Mose Duberstein never considered that he as an individual was rendering any service to Mohawk. All business transactions in the past have always been between Mohawk Metal Corporation and Duberstein Iron & Metal Company. When Mose Duberstein was told of the Cadillac purchased for him, he naturally assumed it was a gift and accepted it as such.

"I would appreciate hearing from you regarding this matter at your earliest convenience.

"Very truly yours."

Q. Was that letter ever answered? A. No, sir.

The Court: You've read the letter in full?

The Witness: Yes, sir.

The Court: Very well.

By Mr. Kusworm:

Q. Now, further carrying out the question of His Honor, did you follow through on this matter with Mr. Gorin, who was the accountant for Mohawk, and let's tell His Honor what you did about that. A. I, also, corresponded with Mr. Gorin. I wrote to Mr. Gorin several times. I finally received one answer.

23 The Court: Well, rather than read those into the record why don't you offer them, offer copies of the letters?

Mr. Kusworm: Very well, Your Honor.

The Court: Or offer the—

Mr. Kusworm: We will offer them.

The Court: The originals, I take it, are not in your hands.

Mr. Kusworm: They are not. But we will offer in evidence, Your Honor, to show the actions of the Certified Public Accountant for the tax payer—

The Court: Do you have any objection?

Mr. Biltz: I would like to see that last letter he was going to read.

The Court: You have no objection if these copies—

Mr. Kusworm: I want to show the letter to the accountant first.

The Witness: Well, I wrote several letters to him, Mr. Kusworm. Which one—

Mr. Kusworm: Now, this—

The Witness: I wrote my last letter on August 26, I believe, of 1956.

Mr. Kusworm: Here's the letter that he just—

By Mr. Kusworm:

Q. There was one that you wrote July 2nd, 1955. Is that right? A. Yes, sir.

The Court: If you gentlemen can agree, that is, if you have no objection, it would be better to have the letter, itself, in the record, than reading it.

Mr. Biltz: Yes, it would. I would like to see that last letter.

Mr. Kusworm: Yes. We would like to offer in evidence, Your Honor, all of these letters.

The Court: And the reply.

Mr. Kusworm: And the reply. For the reason that—

24 By Mr. Kusworm:

Q. You, Mr. Flagel, had a talk with Mr. Gorin, didn't you? A. Several talks.

Q. Several talks with him. And what did Gorin say? A. Gorin said substantially—well, the last talk I had with him was on September 6 of 1956.

Q. What did he say about the reason why this was put on Mohawk's books? A. Well, he had talked with Mr. Berman, and explained to Mr. Berman that if the Cadillac was recorded as a gift it would not be deductible as such. Mr. Berman wanted to know how it would be deductible, and—

Mr. Biltz: Objection, Your Honor. He's—

The Court: It will be sustained.

If Mr. Biltz doesn't object to those letters, I'll permit you to offer copies.

Mr. Biltz: I believe I'll object to the letters, too, Your Honor. They are self-serving declarations, they are hearsay, and they are trying to prove the donor's intent by statements of the donee, his accountant. They have neither the donor nor his accountant here.

The Court: Well, the only testimony—I am not going to permit you to state what—Who is this man with Mohawk?

Mr. Kusworm: Gorin.

The Court: What Gorin said to you, but if you have any letters there—

Mr. Kusworm: Yes, we have a letter.

The Court: Over his signature, I thought perhaps you could agree that they could be introduced into evidence.

Mr. Kusworm: We have letters that Flagel wrote Gorin in which Flagel corroborated what Gorin told him personally over the phone.

The Court: Have you looked at that letter?

25 Mr. Biltz: I've looked at that letter, that one letter of May 1st is all right. We have no objection to it.

Mr. Kusworm: No, you haven't any objection to it. Then, we want all the correspondence. I think the Court ought to have all the facts in this case.

The Court: Well, have you other letters there?

Mr. Kusworm: Yes, Your Honor.

The Court: Take a look at them, and see if you have

objection to the other letters. I mean Mr. Biltz, I don't care about this man. Mr. Biltz, look at those letters.

Mr. Kusworm: He can look at the whole file, Your Honor. We have nothing to hide in this case. I'm willing to introduce Flagel's file on this case. In other words, I think that this Tax Court ought to have all the facts.

The Court: Well, in order for me to get the facts I've got to have—these conversations you are going to outline to me, I don't know whether they would testify that those are facts or not.

Mr. Kusworm: They are all reflected in the letters, Your Honor.

The Court: Well, I want the letters.

Mr. Kusworm: We want to introduce the letters. We want to introduce the whole file.

The Court: Well, the Court is trying to find out whether or not counsel for the Respondent will object to those letters. If he don't why, we'll have them in evidence.

Mr. Biltz: We would like Counsel to take each letter and introduce each letter separately, letter by letter, so that we could determine at the time which letters we would like to have in evidence and which ones we have objection to.

The Court: Well, if you're going to object to any of those letters from Mr. Gorin—is that his name? I don't want you to object to one—

26 Mr. Biltz: I think we should object to all of them. They are hearsay.

Mr. Kusworm: Well, they are letters between the parties, or their representatives, Your Honor, and it seems to me that the Government would want Your Honor to know all the facts in this case.

The Court: I know, but that is not testimony. They don't have an opportunity to cross-examine the witnesses or anything of the kind. You know that those are not proper evidence, and unless they will waive their objection, they are not admissible. I can't admit them. They are not sworn to, and, then, the Respondent doesn't have any opportunity to cross-examine them, or get them to explain their statements or anything of the kind.

Now, if you expected to use them as witnesses you should have had them here.

Mr. Kusworm: Well, now, if Your Honor please, I would

like to explain something to you. To have Berman here would have been futile. Berman didn't even answer that. Now, I'm going to come to Gorin—I am coming to Gorin. We contacted Gorin on the basis of what he said to Flagel, and Gorin said he wouldn't come here.

The Court: Well, you could have subpoenaed him.

Mr. Kusworm: I know we could have subpoenaed him, but I know what he would have repudiated.

The Court: You could take his deposition.

Mr. Kusworm: That's right, but he would have repudiated it. And the bald statement of the record right now is that this was purely and simply a gift, and let the Government refute our testimony on that point if they are objecting to the letters.

I want to ask you a question.

27 The Court: I will permit Mr. Berman's testimony to stand, but I am not going to permit the introduction of those letters at this time.

Mr. Kusworm: I understand that, Your Honor.

The Court: I am not going to permit you to read them into the record either.

Mr. Kusworm: I understand that, Your Honor. But you will permit me to taken an exception.

The Court: Yes. I will note your exception.

Mr. Kusworm: Thank you.

By Mr. Kusworm:

Q. I want to ask you this final question: Had you gotten form 1099 what would you have done with respect to that matter? A. I would have—

Q. In 1952. A. I would have advised Mr. Duberstein that that item was income to him for the year '51 and included it as such in his 1951 return.

Mr. Kusworm: You may cross-examine.

Cross-Examination

By Mr. Biltz:

Q. If you would have later received the form 1099 would you have still—would you have filed an amended return? A. How much later?

Q. A couple years, two years. A. I would have advised Mr. Duberstein about it, and if it was determined to be

income to him for the year '51, an amended return would have been filed, yes.

Q. Did Mr. Berman advise you that he had sent that 1099 to Mr. Duberstein? A. I never talked with Mr. Berman, or I never received an answer to my registered letter.

28 Q. Do you know whether Mohawk sent a form 1099? A. I don't know.

Q. You have no knowledge of that. A. I do know this, but it has to be through my telephone conversation with Mr. Gorin. Now, he explained to me that he did send 1099s out and he sent them all by registered mail, and he couldn't find the receipt for this particular 1099 although he told me he had receipts for all the other 1099s that he sent out.

Mr. Biltz: That is all.

Mr. Kusworm: That is all.

(Witness excused.)

Colloquy Between Court and Counsel

Mr. Kusworm: We rest.

The Court: Before you rest I want to ask Mr. Duberstein, what did you do with this Cadillac, Mr. Duberstein, after you received it?

Mr. Duberstein: What did I do with it? I used it officially.

The Court: Well, you had a Cadillac, you had an Oldsmobile, so you kept all three of them.

Mr. Duberstein: Yeah, I kept all three of them.

The Court: Very well.

The Petitioner rests?

Mr. Kusworm: The Petitioner rests.

The Court: Very well.

Mr. Biltz: The Respondent had subpoenaed a witness but the witness, we didn't give him enough time to appear, and we don't believe he is necessary anyhow now, and the Respondent rests.

The Court: Very well, gentlemen. How much time do you desire for filing of briefs?

Mr. Kusworm: I'd like to have as much time as it takes for me to walk to the bench, Your Honor.

29 The Court: Well, I'm going to give you more time than that, unless you are a slow walker.

Mr. Kusworm: I don't need any more time.

The Court: The Petitioner will have 45 days in which to file his orgiinal brief. That will be what date? Give us a specific date.

Mr. Kusworm: We are filing it now, Your Honor. We don't need any time.

The Court: I will make the entry and you may file it any time you want.

Mr. Kusworm: That's all right. We'll leave it right with this Clerk.

The Court: That will be what date, Mr. Clerk?

The Clerk: June 18.

The Court: How's that—June 18?

The Clerk: Yes, sir.

The Court: And the Respondent will be given 30 days thereafter to file his answer brief.

The Clerk: That will be July 18.

The Court: July 18. And the Petitioner will have 20 days from that date to file a reply to the Respondent's brief. That will be—

The Clerk: That will be—

The Court: August—

The Clerk: August the 7th.

The Court: The reply brief can be filed on or before August 7th.

The Clerk: This is you brief?

Mr. Kusworm: Yes. How many copies do you want?

The Clerk: One more copy.

Mr. Kusworm: One more?

The Clerk: Yes.

Mr. Kusworm: Very well.

The Clerk: Let the record show I am given the Petitioner's brief.

Mr. Kusworm: They are all signed.

The Clerk: Very well.

The Court: Call the next case.

(Whereupon, at 10:45 o'clock, A.M., Friday, May 3, 1957, the hearing was closed.)

IN THE TAX COURT OF THE UNITED STATES

Memorandum Findings of Fact and Opinion

T. C. Memo. 1958-4
(Filed January 17, 1958)

SIDNEY G. KUSWORM, SR., ESQ., for the petitioners.
JAMES D. BLITZ, ESQ., for the respondent.

This proceeding involves a deficiency in income tax for the year 1951 in the amount of $2,570.48.

The sole issue is whether a Cadillac automobile received by petitioner, Mose Duberstein, from the Mohawk Metal Corporation in 1951 was a gift or constitutes taxable income.

FINDINGS OF FACT

Petitioners are husband and wife, residing at 1429 Bryn Mawr Drive, Dayton, Ohio. Their return for 1951 was filed with the director of internal revenue for the district of Ohio at Cincinnati, Ohio.

Petitioner, Mose Duberstein, is the president of Duberstein Metal Company of Dayton, Ohio, which did business with the Mohawk Metal Corporation, hereinafter referred to either as Mohawk or the payor.

In the taxable year 1951, at the solicitation of Morris Berman, president of Mohawk, Duberstein furnished
31 certain information which proved helpful to Mohawk in obtaining consumers for certain chemical products it handled. Subsequently thereto, in the year 1951, Duberstein received from Mohawk a Cadillac car of the fair market value of $4,250.

Prior to the time Duberstein furnished the information to Mohawk he had not been employed with that corporation. Duberstein had no agreement or understanding that he would be paid for the information which he furnished to Mohawk.

Mohawk considered the payment of the Cadillac automobile as in the nature of a "finder's fee," and treated the payment as a business expense and took a deduction therefor for Federal income tax purposes. Mohawk filed form 1099 as required by section 147 of the Internal Revenue Code of 1939 showing the payment of the Cadillac automobile to Duberstein.

In determining the deficiency the respondent included the amount of $4,250, representing the fair market value of the Cadillac automobile, in petitioners' gross income for 1951.

The amount of $4,250, representing the fair market value of a Cadillac automobile received by petitioner, Mose Duberstein, in 1951, from Mohawk Metal Corporation was not a gift but was a payment made in consideration of services rendered to it by Duberstein.

OPINION

LeMire, Judge: The sole question presented is whether the fair market value of a Cadillac automobile which the Mohawk Metal Corporation delivered to Duberstein in the taxable year 1951 was a gift within the meaning of section 22(b)(3), or constituted compensation for services rendered within the purview of section 22(a) of the Internal Revenue Code of 1939. Petitioner does not contest that the fair market value of the automobile was $4,250.

Whether the payment was a gift or taxable income depends upon the intention of the parties, and the intention is to be determined from a consideration of all the facts and surrounding circumstances. *Alice M. MacFarlane*, 19 T. C. 9; *Fisher* v. *Commissioner*, 39 F. (2d) 192; *L. Gordon Walker*, 25 T. C. 832; *Ruth Jackson*, 25 T. C. 1106.

The intention of the donor is of particular importance, although the recipient's understanding of the nature of the payment is relevant.

The record is significantly barren of evidence revealing any intention on the part of the payor to make a gift. On the contrary, the testimony of petitioners' accountant reveals facts and circumstances surrounding the payment justifying the reasonable inference that the payor never intended the payment as a gift.

Petitioners contend that the payment was made as the result of a close personal relationship that existed between Duberstein and Berman, the president of the payor. The latter, however, was not called as a witness.

Petitioners take the position that Duberstein was not an employe of the payor at any time; that at the request of Berman over the telephone he voluntarily and without ex-

pectation of a reward, furnished information as to possible consumers of certain products handled by the payor; that such information was given gratuitously, and that he accepted the automobile only because of Berman's insistence that he accept it as a gift.

That Duberstein was not an employee of the payor; that he gave the information voluntarily because of the close personal relationship existing between himself and Bermas and without expectation of remuneration bears on Duberstein's intent in accepting the automobile. It is not sufficient to establish the donative intent of the payor.

A payment may be compensation for services rendered although made voluntarily and without legal obligation on the part of the payor. *Leon D. Hubert, Jr.*, 20 T. C. 201; affd. 212 F. (2d) 516; *Poorman* v. *Commissioner*, 131 F. (2d) 946.

The payment was made by a corporation and it entered the payment on its books as a "finder's fee." The corporation not only claimed the amount as a business expense on its Federal income tax return, but filed an information return (form 1099) as required by section 147 of the Internal Revenue Code of 1939, disclosing the payment to Duberstein. Such facts tend to negate any donative intent of the payor.

Furthermore, this record is barren of any evidence that the directors or stockholders gave approval to a gift of corporate funds. The lack of such evidence creates an assumption that no gift was intended. Cf. *Alex Silverman*, 28 T. C. 1061.

The services of Duberstein were solicited by the metal corporation from which it presumably benefited so that the payment may be properly categorized as compensation for personal services.

Petitioners advance the argument that since the testimony of Duberstein was uncontradicted, and his credibility was not questioned, the presumption of the correctness of the respondent's determination is overcome and meets petitioners' burden of showing a gift. In the light of the testimony of petitioners' account revealing facts tending to negate any donative intent of the payor, the argument is not persuasive.

34 Upon this record, we conclude that petitioners have failed to carry the burden of proving that the automobile was a gift. The only justifiable inference is that the automobile was intended by the payor to be remuneration for services rendered to it by Duberstein. As such it constitutes taxable income in 1951 within the purview of section 22(a), I. R. C. of 1939.

Petitioners concede the correctness of the respondent's adjustment relative to the medical deduction claimed.

Decision will be entered for the respondent.

IN THE TAX COURT OF THE UNITED STATES

Decision—January 20, 1958

Pursuant to the determination of the Court, as set forth in its Memorandum Findings of Fact and Opinion filed January 17, 1958, it is ORDERED AND DECIDED: That there is a deficiency in income tax for the year 1951 in the amount of $2,570.48.

/s/ C. P. LEMIRE,
Judge.

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35 **Minute Entry of Argument and Submission—February 25, 1959**

(omitted in printing)

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36 IN THE UNITED STATES COURT OF APPEALS

Judgment—April 8, 1959

On Petition to Review a decision of the Tax Court of the United States.

This cause came on to be heard on the transcript of record from the Tax Court of the United States, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this court that the decision of the said Tax Court in this cause be and the same is hereby reversed.

37 (File endorsement omitted)

No. 13,646

IN UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MOSE DUBERSTEIN and SYLVIA DUBERSTEIN, husband and wife, *Petitioners*,

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*.

On Petition for Review of Decisoin of the Tax Court

Before MARTIN, Chief Judge; MILLER, Circuit Judge; and O'SULLIVAN, District Judge.

Opinion—Decided April 8, 1959

O'SULLIVAN, District Judge. The sole question in this case is whether a Cadillac automobile received by the taxpayer Duberstein in the year 1951 from Mohawk Metal Corporation, was a gift or taxable income. The Tax Court found that it was not a gift, and affirmed the action of the Commissioner of Internal Revenue in assessing a deficiency against Duberstein by including in his 1951 income the sum of $4,250.00, the fair market value of the Cadillac.

Duberstein was President of Duberstein Iron and Metal Company of Dayton, Ohio, and Morris Berman was President of Mohawk Metal Corporation of New York. These two corporations had done business with each other in the buying and selling of various metals over a period of years. Duberstein and Berman were personally acquainted. On some occasions when these two corporate officers were talking to each other, Berman would ask questions
38 about names of consumers who used various chemicals. Duberstein gave Berman the names of such consumers known to Duberstein. At some time in the year 1951, Berman called Duberstein and told him that some of the information given to Berman was so helpful that he felt he wanted to give Duberstein a present. He stated that he had a Cadillac car for Duberstein and requested him to come to New York to receive it as a gift. At that time, Duberstein advised Berman that he did not feel Berman

or the company owed him anything, that he had not expected anything for the information given to Berman, and had not intended to be compensated. He testified that Berman insisted he accept the Cadillac car. Duberstein did so. No further conversations were had between Duberstein and Berman, after receipt of the car, concerning the question of whether it was a gift or was taxable compensation. It was undisputed that Duberstein was not an employee of the Mohawk Metal Corporation and that there was no understanding or agreement between him and Mohawk Metal Corporation that he was to be compensated in any way for information given Berman.

In 1954, an agent of the Internal Revenue Department got in touch with Duberstein and stated his intention to charge Duberstein with receipt of income in 1951 in the amount of the fair market value of the Cadillac. Duberstein referred the matter to his accountant, one Flagel, who then learned that Mohawk Metal Corporation had deducted as expense the value of the Cadillac car on its tax return for 1951, classifying the item as a "finder's fee" paid to Dubersfein. Mr. Flagel wrote several letters to Berman concerning the matter, but got no response. He then contacted one Gorin, the accountant who prepared the income tax return for Mohawk Metal Corporation. Evidence was received by the Tax Court that when Gorin, Mohawk's accountant, prepared the 1951 tax return for the corporation, he discussed the matter of this Cadillac automobile with Berman. He gave Flagel the following account of his talk with Berman:

> "Well, he had talked with Mr. Berman and explained to Mr. Berman that if the Cadillac was recorded as a gift, it would not be deductible as such. Mr. Berman wanted to know how it would be deductible."

39 The Tax Court concluded as follows:

> "Upon this record, we conclude that petitioners have failed to carry the burden of proving that the automobile was a gift. The only justifiable inference is that the automobile was intended by the payor to be remuneration for services rendered to it by Duberstein."

It bottomed its decision primarily upon its finding that, "the record is significantly barren of evidence revealing any intention on the part of the payor to make a gift."

We believe that the taxpayer met his burden of proof and that any presumption in favor of the correctness of the Commissioner's assessment disappeared when met by uncontradicted evidence that the Cadillac automobile was a gift. The Tax Court was of the opinion that there was no evidence introduced by taxpayer as to the donor's donative intent. In this, we think the Tax Court disregarded the effect of the uncontradicted testimony. It was not necessary to bring in the donor, himself, to prove his donative intent. The taxpayer's uncontradicted evidence gave an account of what was said and done at the time the event occurred. The intent that then prevailed should control the character of the transfer. Duberstein testified as follows:

> "He (Mr. Berman) told me that due to the fact that I—information that I had given him was so helpful, that he felt that he wanted to give me a present. I told him he didn't owe me anything. And he said, well, he had a Cadillac car as a gift, and I should send to New York to receive it, which I finally did. But I told him he owed me nothing, and I didn't expect anything for the information, and I didn't intend to be compensated, but he insisted and I accepted this Cadillac car."

The foregoing is clear and distinct evidence of the donative intent of Berman at the time that arrangements were made to deliver the Cadillac car. This evidence was not impeached, and we think the Tax Court was in error in its assertion that the record was barren of any proof of donative intent. The Tax Court inferred lack of donative intent on the part of Berman because his corporation took the value of the car as a business expense, classifying it as a "finder's fee". If, in fact, there was donative intent at the time of the event involved, a subsequent change of mind by the donor at income tax time, cannot change the character of what was, in fact, a gift at the time it was made. The evidence received as to the conversation between the accountants for Duberstein and for

Mohawk Metal Corporation clearly indicates that treating what had been a gift as a business deduction was either an afterthought or a change of mind on the part of Berman.

> "He * * * explained to Mr. Berman that if the Cadillac was recorded as a gift it would not be deductible as such. Mr. Berman wanted to know how it would be deductible."

The foregoing strongly indicates that even at the time of the discussion with his accountant, Mr. Berman was talking about this Cadillac as a gift. The fact that a decision may then have been made to label it as a "finder's fee" and claim it as a deduction, does not change the original character of the transaction. The Government offered no evidence to contradict Duberstein.

The appropriate rule has been stated by this Court in an Opinion by Judge Denison in the case of *Rookwood Pottery Co.* v. *Commissioner of Internal Revenue*, 45 F. (2) 43 (45):

> "We see no reason why the taxpayer did not make its case when it put in proofs clearly and distinctly tending to show this value; and when the proofs so introduced remained unchallenged by contrary proofs or by destructive analysis, it was the duty of the Commissioner to decide the issue in accordance with the proof then appearing before him; and it was, we think, the duty of the board to take the same view."

In the case of *Lunsford* v. *Commissioner of Internal Revenue*, 62 F. (2) 740 (742), this Court reaffirmed this principle in a case very much in point with the case at bar. There the question was whether or not a payment was a gift or compensation. Speaking for this Court, Judge Simons said:

> "We have repeatedly held that the taxpayer has made out his case when he has put in proofs 'clearly and distinctly tending to show' a determinating fact. * * * The presumption that the Commissioner is right is procedural and cannot survive such proofs unless they are challenged by contrary proofs, or destructive analysis; and we have gone so far as to say that the taxpayer's affirmative evidence may itself con-

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tain the necessary challenge and furnish the material for such analysis."

We find that the taxpayer's evidence clearly and distinctly offered proof that the Cadillac car was, in fact, a gift. It was not challenged by contrary proofs or destructive analysis.

It may be contended that in such a case as this we should add suspicion to presumption of correctness to aid the Commissioner's assessment of a deficiency. This we can not do. These matters should be decided on evidence. In the case of *Lansford* v. *Commissioner*, supra, Judge Simons characterized such attitude as follows:

> "At most, the Board's finding rests upon mere suspicion, upon an inference that generosity of the kind here involved is so rare that it must necessarily from that fact alone be suspected."

We hold that the taxpayer met his burden of proof that the Cadillac was a gift, and the decision of the Tax Court is, accordingly, reversed.

MARTIN, Chief Judge, dissenting. As I view this case, there was ample circumstantial evidence to support the Commissioner of Internal Revenue and the Tax Court in finding that the appellant received the Cadillac automobile, not as a gift, but for the valuable consideration of services rendered. I am, therefore, unable to concur in the majority opinion.

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42 Clerk's Certificate to foregoing transcript omitted in printing.

43 SUPREME COURT OF THE UNITED STATES

No.

October Term, 1959

COMMISSIONER OF INTERNAL REVENUE, *Petitioner*,

v.

MOSE DUBERSTEIN and SYLVIA DUBERSTEIN

Order Extending Time to File Petition for Writ of Certiorari—July 7, 1959

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including September 5, 1959.

WILLIAM J. BRENNAN, JR.
Associate Justice of the Supreme Court of the United States

Dated this 7th day of
July, 1959

44 SUPREME COURT OF THE UNITED STATES

No. 376

October Term, 1959

(Title omitted)

Order Allowing Certiorari—December 14, 1959

The petition herein for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit is granted. The case is transferred to the summary calendar and set for argument immediately following No. 55.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

U.S. GOVERNMENT PRINTING OFFICE

FILE COPY

No. 376

In the Supreme Court of the United States

OCTOBER TERM, 1959

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

MOSE DUBERSTEIN AND SYLVIA DUBERSTEIN

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

J. LEE RANKIN,
Solicitor General,
CHARLES K. RICE,
Assistant Attorney General,
WAYNE G. BARNETT,
Assistant Attorney General,
GEORGE W. BEATTY,
Attorney,
Department of Justice, Washington 25, D.C.

PETITION FOR WRIT

OF

CERTIORARI

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CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1959

No. —

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

MOSE DUBERSTEIN AND SYLVIA DUBERSTEIN

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Solicitor General, on behalf of the Commissioner of Internal Revenue, prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The findings of fact and memorandum opinion of the Tax Court (R. 30a–34a)[1] are not officially reported. The opinion of the court of appeals (Appendix A, *infra*, pp. 21–26) is reported at 265 F. 2d 28.

JURISDICTION

The judgment of the court of appeals was entered on April 8, 1959 (*infra*, p. 26). On July 7, 1959, by order of Mr. Justice Brennan, the time within which

[1] "R." refers to the appendix to the appellants' brief in the court of appeals.

to file a petition for a writ of certiorari was extended to and including September 5, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

The taxpayer, upon request, gave to a business corporation the names of potential customers. The information proved valuable and the corporation reciprocated by giving the taxpayer a Cadillac, the cost of which it deducted as a business expense in the nature of a finder's fee. The question is whether the car was income to the taxpayer or a "gift" excludible under § 22(b)(3) of the Internal Revenue Code of 1939.

STATUTES INVOLVED

Internal Revenue Code of 1939 (26 U.S.C., 1952 ed.):

> SEC. 22. GROSS INCOME.
>
> (a) *General Definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *
>
> (b) *Exclusions from Gross Income.*—The following items shall not be included in gross

income and shall be exempt from taxation under this chapter:

* * * * *

(3) *Gifts, bequests, and devises.*—The value of property acquired by gift, bequest, devise, or inheritance (but the income from such property shall be included in gross income);

* * * * *

STATEMENT

Mose Duberstein, the taxpayer,[1] was the president of the Duberstein Iron & Metal Company of Dayton, Ohio. He was personally acquainted with Morris Berman, the president of the Mohawk Metal Corporation, the two companies having done business with each other over a period of years. On several occasions in 1951, Berman asked Duberstein if he knew of any concerns that used certain products sold by Mohawk, and Duberstein suggested various names. There was no understanding or agreement that Duberstein would be paid for the information (R. 15a). Later in 1951, Berman telephoned Duberstein; the substance of the conversation, as related by Duberstein, was as follows (R. 16a):

> He told me that due to the fact that I—the information that I had given him was so helpful, that he felt that he wanted to give me a present. And I told him he didn't owe me anything. And he said, well, he had a Cadillac car as a gift, and I should send to New York to receive it, which I finally did. But I told him he owed me nothing, and I didn't expect

[1] Sylvia Duberstein is a party only because she filed a joint return with her husband.

> anything for the information, and I didn't intend to be compensated but he insisted that I accept this Cadillac car.

Mohawk deducted the cost of the car as a business expense in the nature of a finder's fee. Duberstein treated the car as a gift and did not report it as income (R. 31a).

In deficiency proceedings, the Tax Court upheld the Commissioner's determination that the car was taxable income to Duberstein, finding no evidence that it was intended as a gift (R. 30a–34a). The court of appeals, with Chief Judge Martin dissenting, reversed, holding that Duberstein's account of the telephone conversation was "clear and distinct evidence of the donative intent of Berman" and required a finding of a gift excludible from income under § 22(b)(3) of the Internal Revenue Code of 1939 (*supra*, pp. 2–3).

REASONS FOR GRANTING THE WRIT

There is now pending before the Court, in *United States* v. *Kaiser*, No. 55, certiorari granted, 359 U.S. 1010, the question whether strike benefits paid by a union to striking employees are taxable to the recipients as income or are within the statutory exclusion for "gifts." The instant case is one of two cases involving related gift-income problems which the Government intends to urge the Court to hear and consider simultaneously with its consideration of the *Kaiser* case. The other, in which we are informed the taxpayer intends to file a petition for certiorari, is *Stanton* v. *United States*, decided July 6, 1959 (rehearing denied, July 30, 1959), in which the Court of

Appeals for the Second Circuit, by a divided court, reversed a district court decision that a $20,000 "gratuity" paid by a corporation to its resigning president was exempt as a gift. (The opinion in the *Stanton* case is set forth as Appendix B, *infra*, pp. 27–36.)

In common with the *Kaiser* case, these cases pose the basic problem of the characterization as gift or income of payments made without legal obligation in a business context. In the *Kaiser* case, however, the underlying issue is complicated by a number of unique aspects of the strike-benefits problem: *e.g.*, the fraternal or mutual-benefit nature of a labor organization; the relation of the payments to need; and the express condition of the payments that the recipient be on strike. For that reason, we believe that the basic gift-income problem is not fully or adequately presented by the *Kaiser* case alone, and that the Court should also have before it the more fundamentally important aspects of the problem presented by this case and *Stanton*.

1. The problem presented by these cases is essentially the continually recurring one of reconciling the implications of *Bogardus* v. *Commissioner*, 302 U.S. 34, with those of *Old Colony Trust Co.* v. *Commissioner*, 279 U.S. 716, 730. It has been accepted doctrine at least since the *Old Colony* case that a payment may be compensation for services even though there is no obligation to make it. Yet *Bogardus* seems to hold that a payment is not necessarily income because "inspired by gratitude for the past faithful service of the recipient" (p. 44). If a payment may be income though gratuitously made and may be a gift though made in recognition of past services, there is necessarily great difficulty in dis-

tinguishing between the one and the other. After twenty years of experience under *Bogardus*, the lower courts, we believe, have been unable to find a satisfactory answer, with the result that decisions have turned essentially upon *ad hoc* judgments of tax policy—sometimes characterized as conclusions of "fact"—or even upon the payor's self-serving characterization of the payment.[3]

[3] Because the lower courts seldom refine the issues beyond the ultimate question whether the payment was "intended" as a gift or explain the rationale for their decisions, the nature of the uncertainties and inconsistencies cannot readily be summarized. Since the courts most frequently content themselves with listing the "evidence" supporting one conclusion or the other—which in itself, we suggest, reflects the lack of guiding principles—perhaps the best index of the underlying confusion is the extent of disagreement over the relevance of particular kinds of evidentiary facts. It has been held, for example, to be important by some courts but immaterial by others: that the payor deducted the payment (compare *Willkie* v. *Commissioner*, 127 F. 2d 953, 956 (C.A. 6), certiorari denied, 317 U.S. 659; *Bausch's Estate* v. *Commissioner*, 186 F. 2d 313, 314 (C.A. 2); *Poorman* v. *Commissioner*, 131 F. 2d 946, 949 (C.A. 9); *Silverman* v. *Commissioner*, 28 T.C. 1061, 1066; with *Bounds* v. *United States*, 262 F. 2d 876, 882 (C.A. 4); *Hellstrom* v. *Commissioner*, 24 T.C. 916, 919); that the payments were not ratified by the stockholders (compare *Noel* v. *Parrott*, 15 F. 2d 669, 671 (C.A. 4), certiorari denied, 273 U.S. 754; *Botchford* v. *Commissioner*, 81 F. 2d 914, 916 (C.A. 9); *Fitch* v. *Helvering*, 70 F. 2d 583, 586 (C.A. 8); *Yuengling* v. *Commissioner*, 69 F. 2d 971, 972 (C.A. 3); *Walker* v. *Commissioner*, 25 T.C. 832, 837; with *Lunsford* v. *Commissioner*, 62 F. 2d 740, 742 (C.A. 6); *Macfarlane* v. *Commissioner*, 19 T.C. 9); that the widow of an employee had not herself performed services (compare *Bounds* v. *United States*, *supra*; *Lunsford* v. *Commissioner*, *supra*; *Luntz* v. *Commissioner*, 29 T.C. 647, 650; with *Simpson* v. *United States*, 261 F. 2d 497, 501 (C.A. 7), certiorari denied, 359 U.S. 944; *Varnedoe* v. *Allen*, 158 F. 2d 467, 468 (C.A. 5), certiorari denied, 330 U.S. 821; *Fisher* v. *United States*, 129 F. Supp. 759, 762 (D. Mass.); and that death bene-

This case and *Stanton*, we believe, provide an appropriate occasion for a further examination of the problem by this Court. Each is a prototype of a typical problem, and the basic conflict in their concepts of the nature of a gift for tax purposes discloses the causes and nature of the confusion in the lower courts.

(*a*) *The Duberstein Case:* In *Duberstein*, we may accept the description of the transaction given by Duberstein himself (R. 16a):

> He [Berman] told me that due to the fact that I—the information that I had given him was so helpful, that he felt that he wanted to give me a present. * * * I told him he owed me

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fits paid to a widow or the employee's estate were based on the amount of his salary (compare *Simpson* v. *United States*, *supra*; *Rausch's Estate* v. *Commissioner*, *supra*; *Willkie* v. *Commissioner*, *supra*; *Jackson* v. *Commissioner*, 25 T.C. 1106, 1111; with *Bounds* v. *United States*, *supra*; *Hellstrom* v. *Commissioner*, 24 T.C. 916, 919). Perhaps most unclear of all is the weight given to the payor's own characterization of the payment as a gift or as compensation, which may from time to time be controlling, significant, inconclusive, or immaterial. See, *e.g.*, the present case; *Botchford* v. *Commissioner*, *supra*; *Bounds* v. *United States*, *supra*; *Wallace* v. *Commissioner*, 219 F. 2d 855, 858 (C.A. 5); *Lincoln Nat. Bk.* v. *Burnet*, 63 F. 2d 131, 133 (C.A. D.C.).

Nor is there even agreement over the nature of the ultimate question as one of "fact", subject to review only under the "clearly erroneous" standard or to be left to the jury, or as one of law or of mixed law and fact, on which the appellate courts may draw their own conclusions from the evidentiary facts. Compare *Peters* v. *Smith*, 221 F. 2d 721 (C.A. 3); *Neville* v. *Brokrick*, 235 F. 2d 263, 266 (C.A. 10); *United States* v. *Bankston*, 254 F. 2d 641, 642 (C.A. 6); *Stanton* v. *United States*, *supra* (dissenting opinion); with *Bogardus* v. *Commissioner*, *supra*; *Bounds* v. *United States*, *supra*; *Simpson* v. *United States*, *supra*; *Willkie* v. *Commissioner*, *supra*.

> nothing, and I didn't expect anything for the information, and I didn't intend to be compensated, but he insisted that I accept this Cadillac car.

That testimony established the undisputed facts that Duberstein gave the information without expectation of payment, that the information proved valuable, and that the car was given in appreciation for the information. There was thus sharply posed the question whether a voluntary payment prompted by gratitude for business services was taxable. To the court below, however, that question turned on a further question of fact, *i.e.*, whether the payment was intended "as" a gift. The court then found controlling evidence of an intent to make a gift in the very testimony quoted above, corroborated, the court said, by an indication that Berman "was talking about this Cadillac as a gift" in later discussions with his accountant (*infra*, p. 24). All that either source added to the conceded fact that the payment was voluntary, however, was that Berman called it a "present" or a "gift". That, we submit, did not advance the critical inquiry. Since there was no obligation to make the payment, many laymen undoubtedly would call it a gift. If, on the other hand, Berman was thinking of the tax, rather than a lay, definition, his characterization was no more than his own legal conclusion, which is equally irrelevant. Thus, the decision below rests ultimately either on an unarticulated judgment that payments made freely and voluntarily should be treated as gifts for tax purposes even though motivated by gratitude for services, or

on the irrelevant fortuity that the payor called it a "present."

(*b*) *The Stanton Case:* In *Stanton*, the president of a real estate corporation resigned after ten years of service and was voted by the board of directors, "in appreciation of [his] services * * *, a gratuity" of $20,000.[4] It was testified that the directors "liked" him "personally", thought that he "was entitled to that evidence of good will", and intended the payment as a "gift." The district court found that the payment was a "gift" and not taxable. The Court of Appeals for the Second Circuit, in an opinion by Judge Hand, after finding it "impossible to reconcile the decisions," held that the payment was income on the ground that there was "no evidence that personal affection did enter into the payment" or that the payment was anything "more than an expression of gratitude for exceptional services rendered" (*infra*, pp. 27–31).

(*c*) The approach of the Second Circuit in *Stanton* was fundamentally different from that of the Sixth Circuit below in *Duberstein*. Rather than asking what the payment was intended *to be*, the court in *Stanton* focused attention directly on the motives for the payment and made those determinative of the legal consequences. More importantly, it in effect defined gratitude for services as a motive which, if alone or dominant, gives rise to income. In its view, only if some in-

[4] The real estate corporation was wholly owned by the Trinity Church, of which Stanton was also comptroller, and the payment came in part from the church itself, but those facts have no significance here.

dependent motivation, such as personal friendship or affection, plays a major role in inducing the payment can the question of "gift" arise. Since in the *Duberstein* case it was never claimed that personal affection, as distinct from business gratitude, entered into the payment, the underlying conflict between the two decisions seems to us apparent.[5]

2. While the problem presented by these cases has its counterpart in the context of payments between individuals, its primary importance lies in the tax treatment of payments made by business entities, and particularly, as here, by corporations. The peculiar significance of the problem in that context derives from the interrelation of the tax consequences of such a payment to the several potential taxpayers involved—the payee, the payor, and, in the case of a corporation, the payor's officers or stockholders.

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[5] Even more directly in conflict on its facts with the *Stanton* case is the decision of the Third Circuit in *Peters* v. *Smith*, 221 F. 2d 721, holding that the jury had properly found that a pension paid by a department store to an employee retired after 41 years of service because no longer able to perform his duties was a gift, notwithstanding the employer's established policy to provide such pensions to employees no longer able to work. As in *Duberstein*, the court framed the issue as one of fact whether the payment was "intended" as compensation or a gift. Compare the earlier decision of that court in *Mutch* v. *Commissioner*, 209 F. 2d 390, reversing a Tax Court finding that a pension paid to a retiring minister out of church funds was compensation and not a gift. See also *Schall* v. *Commissioner*, 174 F. 2d 893 (C.A. 5); *Abernethy* v. *Commissioner*, 211 F. 2d 651 (C.A.D.C.); and *Hershman* v. *Kavanagh*, 120 F. Supp. 956 (E.D. Mich.), affirmed, 210 F. 2d 654 (C.A. 6), similarly holding pensions to ministers or rabbis to be gifts, in the first two reversing contrary decisions of the Tax Court.

Under the definition of gifts seemingly being applied by most of the lower courts, "gifts" and "business expenses" are not mutually-exclusive categories and a payment may be both a gift nontaxable to the recipient and a business expense deductible by the payor.[6] The effect of such non-exclusive definitions of gifts and business expenses is that what is admittedly an income item to begin with—the earnings of the business used to make the payment—may escape taxation altogether. That is, a deductible payment, since it reduces the income otherwise taxable to the payor, in effect comes "out of" its business income. If, in turn, the payment is treated as a "gift" to the payee, the result is that the income is taxable neither to the payor nor to the payee. A further aspect of the

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[6] See, *e.g.*, the explicit statement of the Third Circuit: "Of course, a gift may be a business expense and as such a legitimate deduction in the donor's income tax computation." *Peters* v. *Smith*, *supra*, 221 F. 2d at 725, n. 3.

The most frequent example of this result occurs in the "widow bonus" cases. Although it has been generally accepted that the continuation of a deceased employee's salary to his widow for a short period is a proper business expense, numerous cases hold with relative consistency that, in the absence of a contractual obligation (or possibly a moral obligation arising from an established practice on which the employee may have relied), such payments are nontaxable gifts to the widow. See *Bounds* v. *United States*, *supra*; *Reed* v. *United States* (W.D. Ky), decided January 16, 1959 (59-1 U.S.T.C., par. 9264), appeal pending (C.A. 6); and the 30-odd cases cited in Jennings, *Voluntary Payments to Widows of Employees*, 37 Taxes 531, 534, n. 8. Cf. *Simpson* v. *United States*, *supra*. Nor is that result due to inconsistent factual determinations. Rather, it is due to the fact that the definition of gifts being applied is itself broad enough to include some payments that are *properly* deductible.

problem, though less apparent, is that if the payor is a corporation its business income used to make the "gift" has not been fully taxed even if the corporation itself does not claim a deduction: although taxed at corporation rates, the income has passed out of the corporation into the hands of an individual who is presumably the object of the officers' or stockholders' bounty without having been taxed at individual surtax rates either to the officers or stockholders or to the recipient.

That aspect of the "business gift" problem—the interrelation of the tax consequences to the payee, the payor, and the payor's officers or stockholders—not only emphasizes the importance of the problem but also focuses attention on the basic question of statutory interpretation which we believe is posed by these cases, namely, whether and to what extent there should be attributed to Congress a purpose, by the gift exclusion, to permit ordinary business income to escape taxation. That is not a consequence of ordinary gifts of a personal non-business nature,[7] and at the very least that result ought not to be accepted for business "gifts" without a more explicit consideration of the underlying purposes of the gift exclusion than has been forthcoming from the lower courts.

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[7] *I.e.*, the typical non-deductible payment by one individual to another. In such cases, the only question is whether the transaction of which the payment is a part is one itself giving rise to income (*e.g.*, performance of personal services by the payee). While that aspect of the problem is also present here, the more fundamental problem is whether what is already an income item should be allowed to escape taxation by virtue of the payment from one taxpayer to another.

3. Notwithstanding the apparent conflict of decisions and the importance of the question, it may be thought that the concept of "gift" is so incapable of precise definition as to admit of no better solution than the *ad hoc* approach of the lower courts, and hence that little could be accomplished by further review by this Court. It is our belief, however, that more meaningful standards for decision can be evolved, and, if the writ is granted in this and the *Stanton* case, we hope to be able to present to the Court a formulation of the problem that will offer some progress towards its solution.

In our view, a substantial step forward can be made, at the outset, by clarifying the elements of "intent" upon which characterization should turn. To the Sixth Circuit in the *Duberstein* case, as to many courts, the question was what the payment was intended *to be*—*i.e.*, whether it was intended "as" a gift or "as" compensation. To the Second Circuit in *Stanton*, on the other hand, the question was *why* the payment was made—*i.e.*, whether it was induced by gratitude for services or by love and affection. The latter approach seems to us the more meaningful one. Given the same motivation for the payment—*e.g.*, appropriate gratitude for valuable services—we question whether there is any distinction between a payment intended "as" compensation for the services and one intended "as" a gift in appreciation of the services. Having decided to make the payment, all the payor then "intends" is to make the payment, and if he thinks of it in his own mind as a "gift" or as "compensation" he can do so only by, wittingly or unwittingly, attributing to it his own legal classification.

All that can reasonably be asked of the trier of fact (or of the payor himself) is what induced the payment, and it is for the courts then to say whether these motives should lead to a characterization of the payment as a "gift".

The crucial problem remains, of course, of defining which motives should be treated as "gift motives," a problem which, because of the uncertainty in the meaning of "intent," seems to have received little direct attention. One tentative approach to that problem, subject to refinement and study of its full implications, is to define "gifts," at least for purposes of gifts by business entities to individuals, in terms mutually exclusive of "business expenses." It may be said that the essence of a gift is that it springs from purely *personal* motivations—love, sympathy, generosity—to which the existence of a business purpose or justification is antithetic. On that view, it would follow that, if a payment is sufficiently an "obligation" of the business to be deemed a just charge against its profits (giving full recognition to the present-day concepts of the responsibilities of a business toward its employees and other persons who contribute to its success), it does not bear the mark of that uniquely personal generosity that characterizes a gift.*

While an explicit recognition of the need to correlate the tax treatment of the payor and the payee

* We are concerned here only with gifts to private individuals which cannot qualify as public or charitable. Charitable contributions, made out of the now-recognized civic and social responsibilities of business, pose a different problem, and the tax consequences are governed by special provisions. See §§ 23(q) and 101 of the 1939 Code; §§ 170 and 501 of the 1954 Code.

would no doubt afford the major argument for adopting that approach, the gift definition itself need not depend upon a determination in each case whether the particular payment was or was not deductible by the payor. The definition of gifts would stand on its own feet, but, by excluding payments for which there is a business justification, would be sufficiently narrow automatically to exclude any payment that could properly be claimed as a deduction. That approach, while recognizing the relevance of the correlation problem to the formulation of a definition of gifts, would not in fact require the court to decide more than the precise issue before it—*i.e.*, whether the particular payment involved is a "gift."

In the case of a corporation, it may be noted, the foregoing approach could have implications going beyond the correlation of taxability to the payee and deductibility by the payor. By definition, a payment would be a gift only if there was no business justification for it and it was motivated solely by the *personal* affection or generosity of, say, the stockholders or the officers. The lack of business purpose for such a payment, however, might require that it be treated for federal tax purposes as having been made on behalf of the individual benefactors (the officers or stockholders, as the case may be), and, accordingly, be taxed as income (additional compensation or dividends) to them. The result could be that an alleged "gift" by a business corporation would be taxable either to the recipient (if made for a business purpose) or to the officers or stockholders whose desires

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were gratified by the payment (if made for no business reason and hence a true gift).

As we have indicated, the foregoing is but a tentative analysis of one possible approach to the problem of "business gifts". That, or other possible approaches, can be fully developed upon a hearing on the merits. Our purpose here is only to demonstrate, as we think the above analysis does, that the present lack of guiding principles is not inherent in the problem and that a more precise formulation of the issues is certainly possible and is desirable.

4. The question presented here is peculiarly one that can be resolved only by this Court. As the majority and dissenting opinions in the *Stanton* case (*infra*, pp. 27–36) illustrate, it is this Court's decision in *Bogardus* v. *Commissioner*, 302 U.S. 34, that has been the major source of the difficulties the lower courts have encountered in dealing with the problem. While the scope given to *Bogardus* seems to us unwarranted, the deference paid by the lower courts in this instance to the implications of a Supreme Court decision is not unusual, and as a practical matter it is only this Court that can confine *Bogardus* to its proper place and open the way for a further clarifying development in this area.

The *Bogardus* case does not, we believe, pose a hazardous obstacle to a reconsideration or reformulation of the problem by the Court. In the first place, that decision was quite expressly limited to its own special facts, and on those facts there is much to be said for the holding. The stockholders of a highly successful

operating company (Universal) had caused the liquid assets of the company to be transferred to a newly-formed investment company (Unopco) and had then sold all of their stock in the operating company. They then, as stockholders of Unopco, voted to pay out of Unopco's assets (charged directly to surplus) a total of some $600,000 to various present and former employees of Universal as an expression of their gratitude for the great success those employees' loyal services had brought them. Viewing Unopco as a separate entity having no connection whatever with the payees, as the Court emphasized it must be viewed, it was clear that there was no business or corporate justification for the payment and that it was motivated entirely by the *personal* good will of the individual stockholders toward the employees of their former corporation. While the logical implication that the payment was a dividend to the stockholders which they then gave to the ultimate recipients was not articulated by the Court, the Court in effect viewed the stockholders themselves (whose ratification was obtained not without reason), rather than Unopco, as the true payors. In that light, the question was simply whether a payment by the *former* stockholders of a corporation to the employees of that corporation should be treated as a gift or as income. The treatment of such a payment as a gift can be justified, as the Court in essence justified it, on the ground that the services were rendered to an entity (the corporation) which is treated for tax purposes as sepa-

rate and distinct from the stockholders.[9] For present purposes, however, it is sufficient to note that the problem posed by such a stockholder payment is very different from that presented by a deductible payment made by a business entity for services received directly by it.

In the second place, to the extent that the language of *Bogardus* may be thought to have broader implications, its vitality has been seriously weakened by other decisions of this Court which, since that case was decided in 1937, have both significantly narrowed the concept of gifts and expanded the concept of income. Without now developing the point, we note, for example, that *Bogardus* was relied upon in *Helvering* v. *American Dental Co.*, 318 U.S. 322, 327, 331,

[9] Since we do not treat a stockholder as being engaged in the business of his corporation for other purposes—and would not, for example, allow him to deduct compensation paid by him directly to an employee of the corporation—it is logical not to treat him as the recipient of the employee's services for purposes of characterizing his payment to the employee. If the payor is a stockholder at the time of the payment, arguably the payment might be treated as compensation to the employee, a contribution to capital by the stockholder (increasing the basis for his stock), and a deductible business expense by the corporation, but the complications of that characterization become even more difficult when the payor is no longer a stockholder. Again, the essential problem is one of correlating the several aspects of the transaction, and in the *Bogardus* situation that correlation is best achieved by treating the payment as a dividend to the stockholders and a gift by them to the employees. With that characterization, the income produced by the employees' services has been taxed to the corporation and would be taxable as a dividend to the stockholders. Were it taxable a third time on payment to the employees, there would be no compensating deduction and, in effect, the same income would be taxed once too often.

in support of a holding that cancellations of indebtedness were gifts whether or not "the motives leading to the cancellations were those of business or even selfish". Less than six years later, however, that decision was most severely limited by *Commissioner* v. *Jacobson,* 336 U.S. 28. See also *Commissioner* v. *LoBue,* 351 U.S. 243, 246–247, summarily rejecting a suggestion that stock options given employees might be gifts. On the income side, there has been a similar expansion of the concept of taxable receipts, culminating in the decision in *Commissioner* v. *Glenshaw Glass Co.,* 348 U.S. 426, and its implication that all "gains" are taxable unless expressly exempted. Against this development in the underlying concepts of gifts and income, *Bogardus,* we believe, can no longer stand as the final word on the tax treatment of voluntary payments made out of gratitude for past services, and the problem is one open for further consideration by the Court.

5. As our summary discussion indicates, these cases, although perhaps insignificant on their facts, turn ultimately on basic concepts of "What is income", and have a theoretical importance beyond that associated with more technical tax questions. The problem is of equal significance to the revenue. It cuts across the whole field of business gifts to individuals, *e.g.,* severance pay, pensions, widow bonuses, employee bonuses, tips, Christmas gifts to buyers, finder's fees, reference fees to lawyers, kickbacks, etc. The payments involved are frequently large—in 34 litigated widow bonus cases, the payments totalled over $1,000,000, an average of almost $30,000 to each

widow[10]—and, since the issue is not simply who will be taxed on the business income given away but frequently whether it will be taxed at all, the effect on the revenue is directly proportional.

Finally, whatever the rule may be, it is important to the administration of the revenue laws that it be more clearly defined. The present lack of guiding principles and the *ad hoc* nature of the lower court decisions means that it is difficult to settle any particular case without litigation—a burden that bears upon the taxpayers, the Treasury, and the courts alike.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari in this case should be granted. If the petition is granted, the Court may wish to set this case (and the *Stanton* case, if the forthcoming petition there is also granted) for argument together with and in advance of *United States* v. *Kaiser*, No. 55.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.
CHARLES K. RICE,
Assistant Attorney General.
WAYNE G. BARNETT,
Assistant to the Solicitor General.
GEORGE W. BEATTY,
Attorney.

SEPTEMBER 1959.

[10] See note 6, *supra*. In two of the 36 cases there referred to, the amounts of the payments were not disclosed in the opinion.

APPENDIX A

No. 13,646

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MOSE DUBERSTEIN AND SYLVIA DUBERSTEIN, HUSBAND AND WIFE, PETITIONERS,

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

ON PETITION FOR REVIEW OF DECISION OF THE TAX COURT

Decided April 8, 1959

Before MARTIN, Chief Judge; MILLER, Circuit Judge; and O'SULLIVAN, District Judge.

O'SULLIVAN, District Judge. The sole question in this case is whether a Cadillac automobile received by the taxpayer Duberstein in the year 1951 from Mohawk Metal Corporation, was a gift or taxable income. The Tax Court found that it was not a gift, and affirmed the action of the Commissioner of Internal Revenue in assessing a deficiency against Duberstein by including in his 1951 income the sum of $4,250.00, the fair market value of the Cadillac.

Duberstein was President of Duberstein Iron and Metal Company of Dayton, Ohio, and Morris Berman was President of Mohawk Metal Corporation of New York. These two corporations had done business with each other in the buying and selling of various metals over a period of years. Duberstein and Berman were personally acquainted. On some occasions when these two corporate officers were talking to each other, Ber-

man would ask questions about names of consumers who used various chemicals. Duberstein gave Berman the names of such consumers known to Duberstein. At some time in the year 1951, Berman called Duberstein and told him that some of the information given to Berman was so helpful that he felt he wanted to give Duberstein a present. He stated that he had a Cadillac car for Duberstein and requested him to come to New York to receive it as a gift. At that time, Duberstein advised Berman that he did not feel Berman or the company owed him anything, that he had not expected anything for the information given to Berman, and had not intended to be compensated. He testified that Berman insisted he accept the Cadillac car. Duberstein did so. No further conversations were had between Duberstein and Berman, after receipt of the car, concerning the question of whether it was a gift or was taxable compensation. It was undisputed that Duberstein was not an employee of the Mohawk Metal Corporation and that there was no understanding or agreement between him and Mohawk Metal Corporation that he was to be compensated in any way for information given Berman.

In 1954, an agent of the Internal Revenue Department got in touch with Duberstein and stated his intention to charge Duberstein with receipt of income in 1951 in the amount of the fair market value of the Cadillac. Duberstein referred the matter to his accountant, one Flagel, who then learned that Mohawk Metal Corporation had deducted as expense the value of the Cadillac car on its tax return for 1951, classifying the item as a "finder's fee" paid to Duberstein. Mr. Flagel wrote several letters to Berman concerning the matter, but got no response. He then contacted one Gorin, the accountant who prepared the income tax return for Mohawk Metal Corporation. Evidence was received by the Tax Court that when Gorin, Mohawk s accountant, prepared the 1951 tax

return for the corporation, he discussed the matter of this Cadillac automobile with Berman. He gave Flagel the following account of his talk with Berman:

> "Well, he had talked with Mr. Berman and explained to Mr. Berman that if the Cadillac was recorded as a gift, it would not be deductible as such. Mr. Berman wanted to know how it would be deductible."

The Tax Court concluded as follows:

> "Upon this record, we conclude that petitioners have failed to carry the burden of proving that the automobile was a gift. The only justifiable inference is that the automobile was intended by the payor to be remuneration for services rendered to it by Duberstein."

It bottomed its decision primarily upon its finding that, "the record is significantly barren of evidence revealing any intention on the part of the payor to make a gift."

We believe that the taxpayer met his burden of proof and that any presumption in favor of the correctness of the Commissioner's assessment disappeared when met by uncontradicted evidence that the Cadillac automobile was a gift. The Tax Court was of the opinion that there was no evidence introduced by taxpayer as to the donor's donative intent. In this, we think the Tax Court disregarded the effect of the uncontradicted testimony. It was not necessary to bring in the donor, himself, to prove his donative intent. The taxpayer's uncontradicted evidence gave an account of what was said and done at the time the event occurred. The intent that then prevailed should control the character of the transfer. Duberstein testified as follows:

> "He (Mr. Berman) told me that due to the fact that I—information that I had given him

> was so helpful, that he felt that he wanted to give me a present. I told him he didn't owe me anything. And he said, well, he had a Cadillac car as a gift, and I should send to New York to receive it, which I finally did. But I told him he owed me nothing, and I didn't expect anything for the information, and I didn't intend to be compensated, but he insisted and I accepted this Cadillac car."

The foregoing is clear and distinct evidence of the donative intent of Berman at the time that arrangements were made to deliver the Cadillac car. This evidence was not impeached, and we think the Tax Court was in error in its assertion that the record was barren of any proof of donative intent. The Tax Court inferred lack of donative intent on the part of Berman because his corporation took the value of the car as a business expense, classifying it as a "finder's fee". If, in fact, there was donative intent at the time of the event involved, a subsequent change of mind by the donor at income tax time, cannot change the character of what was, in fact, a gift at the time it was made. The evidence received as to the conversation between the accountants for Duberstein and for Mohawk Metal Corporation clearly indicates that treating what had been a gift as a business deduction was either an afterthought or a change of mind on the part of Berman.

> "He * * * explained to Mr. Berman that if the Cadillac was recorded as a gift it would not be deductible as such. Mr. Berman wanted to know how it would be deductible."

The foregoing strongly indicates that even at the time of the discussion with his accountant, Mr. Berman was talking about this Cadillac as a gift. The fact that a decision may then have been made to label it as a "finder's fee" and claim it as a deduction, does not change the original character of the transaction.

The Government offered no evidence to contradict Duberstein.

The appropriate rule has been stated by this Court in an Opinion by Judge Denison in the case of *Rookwood Pottery Co. v. Commissioner of Internal Revenue*, 45 F. (2) 43 (45):

> "We see no reason why the taxpayer did not make its case when it put in proofs clearly and distinctly tending to show this value; and when the proofs so introduced remained unchallenged by contrary proofs or by destructive analysis, it was the duty of the Commissioner to decide the issue in accordance with the proof then appearing before him; and it was, we think, the duty of the board to take the same view."

In the case of *Lunsford v. Commissioner of Internal Revenue*, 62 F. (2) 740 (742), this Court reaffirmed this principle in a case very much in point with the case at bar. There the question was whether or not a payment was a gift or compensation. Speaking for this Court, Judge Simons said:

> "We have repeatedly held that the taxpayer has made out his case when he has put in proofs 'clearly and distinctly tending to show' a determinating fact. * * * The presumption that the Commissioner is right is procedural and cannot survive such proofs unless they are challenged by contrary proofs, or destructive analysis, and we have gone so far as to say that the taxpayer's affirmative evidence may itself contain the necessary challenge and furnish the material for such analysis."

We find that the taxpayer's evidence clearly and distinctly offered proof that the Cadillac car was, in fact, a gift. It was not challenged by contrary proofs or destructive analysis.

It may be contended that in such a case as this we should add suspicion to presumption of correctness to

aid the Commissioner's assessment of a deficiency. This we can not do. These matters should be decided on evidence. In the case of *Lunsford* v. *Commissioner*, supra, Judge Simons characterized such attitude as follows:

> "At most, the Board's finding rests upon mere suspicion, upon an inference that generosity of the kind here involved is so rare that it must necessarily from that fact alone be suspected."

We hold that the taxpayer met his burden of proof that the Cadillac was a gift, and the decision of the Tax Court is, accordingly, reversed.

MARTIN, Chief Judge, dissenting. As I view this case, there was ample circumstantial evidence to support the Commissioner of Internal Revenue and the Tax Court in finding that the appellant received the Cadillac automobile, not as a gift, but for the valuable consideration of services rendered. I am, therefore, unable to concur in the majority opinion.

JUDGMENT

(Filed April 8, 1959)

On Petition to Review a decision of the Tax Court of the United States.

This cause came on to be heard on the transcript of record from the Tax Court of the United States, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this court that the decision of the said Tax Court in this cause be and the same is hereby reversed.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 329—October Term, 1958

(Argued May 14, 1959. Decided July 6, 1959.)

Docket No. 25569

ALDEN D. STANTON AND LOUISE M. STANTON, APPELLEES, *v.* UNITED STATES OF AMERICA, APPELLANT

Before: HAND, SWAN and HINCKS, *Circuit Judges.*

HAND, *Circuit Judge:*

The plaintiffs sue to secure a refund of $15,056.29 representing income taxes (principal and interest) paid for the year 1943, which they allege were illegally collected. In 1933 or 1934 the plaintiff, Mr. Stanton, had been retained to manage the real property of Trinity Church in New York. Trinity Operating Company, Inc. was organized to take over this work and Mr. Stanton became its president and a member of its board of directors. Although he was also "Comptroller" of the church, he was never a vestryman or warden; and all his time was occupied in caring for its real estate; his salary was $22,500. In November, 1943, he voluntarily resigned as Comptroller, and as president and director of the Operating Company, and a few days previously the Operating Company had passed a resolution that "in appreciation of the services rendered by Mr. Stanton as

Manager of the Estate and Comptroller of the Corporation of Trinity Church throughout nearly ten years, and as President of Trinity Operating Company, Inc., its subsidiary, a gratuity is hereby awarded to him of Twenty Thousand Dollars * * * provided that, with the discontinuance of his services, the Corporation of Trinity Church is released from all rights and claims to pension and retirement benefits not already accrued up to November 30, 1942." The plaintiffs—Mr. Stanton and his wife—filed joint income tax returns for the years 1942 and 1943, and in their return for 1943 admitted the receipt of the "gratuity" but did not include it in their income because it was a "gift." The Commissioner of Internal Revenue decided that it was income and assessed a deficiency for the year 1943 in the amount of $10,629.57. The plaintiffs eventually paid this with accumulated interest, $15,066.29, and filed a claim for refund upon whose denial they filed this action; and after a trial without a jury Judge Byers granted judgment in their favor.

It is clear in the decisions, perhaps especially in this circuit, that in such situations the test of "compensation" is not whether the donor is under any legal obligation to make the payment; but that it may be his "income" although the donee had no right to enforce its payment. The last of our decisions in *Carragan* v. *Commissioner,* 197 Fed. (2) 246, 248, so declares and in *Nickelsberg* v. *Commissioner,* 154 Fed. (2) 70, we said (p. 71) that the test was whether "what was added was by way of more compensation for a deserving employee or merely to satisfy the employer's desire to become a benefactor." That is indeed not an exact standard, but unhappily it is about as good as any that has been made. *Bogardus* v. *Commissioner,* 302 U.S. 34, is the only

decision of the Supreme Court on the subject and it held for the taxpayer by a vote of five to four. The "bonus" or "honorarium," as the donor there called it, was given by a corporation, called "Unopco," which had the same shareholders as the Universal Oil Products Company, which had been the employer of the donee. The shareholders of "Universal" had sold all their shares to another corporation, United Gasoline Company, reserving only $4,000,000 for "Unopco," a corporation whose "only business was the investment and management of the assets thus acquired." "Unopco" made a general distribution as a "gift" or "honorarium" of $600,000 to all the former employees of "Universal," of which the plaintiff's share was $10,000. Although the shareholders of "Unopco" had been the same as those of "Universal," the donees were not continued as employees of "Unopco," but remained in the employ of "Universal." The Supreme Court seemed to set store upon the fact that "Unopco" was a separate venture, for Justice Sutherland repeated this circumstance as an important factor in the result. We have no warrant for supposing that, if "Universal" had continued its business, the results would have been the same. In the case at bar the business of the Operating Company continued after Mr. Stanton had resigned; moreover, his was a single payment made in "appreciation" of his particular services, and was not part of a free-handed distribution to all employees. Furthermore, as we have said, the resolution contained a proviso that Mr. Stanton should abandon all rights to "pension and retirement benefits." It is true that the uncontradicted testimony was that in fact he was thought to have no such rights; but nevertheless the conclusion is inescapable that the proviso was "to make assurance doubly sure," and it cannot be disregarded in decid-

ing whether the payment was made wholly from generosity, for when that is the case such a proviso is certainly an incongruous addition.

It is impossible to reconcile the decisions, and before *Bogardus* v. *Commissioner, supra,* at times, it appears to have been supposed that the test was whether the payment discharged an enforceable obligation. For example, the Third Circuit certainly assumed that this was true in *Cunningham* v. *Commissioner,* 67 Fed. (2) 205. Moreover in these situations, although not here, there may be an implied promise, which, though not expressed, could support an action in contract; as, for example, if it had been the established practice of the donor to give an "honorarium" to all employees who voluntarily resigned. Probably, we should suppose that, whenever an employee has discharged his duties with outstanding fidelity and capacity, any "honorarium" results from mixed motives: (1) the employer feels that the employee has given more than the bare measure of service required, and that the employer has therefore received more than he could legally have exacted; and (2) that the employer feels friendship, perhaps even affection, for the employee. We are disposed to believe that this accounts for the apparent uniformity with which courts have treated as gifts "honoraria" to clergymen. In such cases the parishioners are apt to be largely moved by gratitude for spiritual direction, kindness and affection and do not think in quantitive terms of whatever financial gains the pastor may have contributed to the corporation. *Schall* v. *Commissioner,* 174 Fed. (2) 893 (C.A. 5); *Mutch* v. *Commissioner,* 209 Fed. (2) 390 (C.A. 3); *Abernethy* v. *Commissioner,* 211 Fed. (2) 651 (C.A. D.C.). We cannot say positively that in the case at bar this second factor may not have had any place in the ac-

tion of the board of directors of the Operating Company; but, since Mr. Stanton's duties were exclusively financial and there is no evidence that personal affection did enter into the payment, we should not assume that it did. Indeed, the resolution was "in appreciation of the services rendered" by him in the conduct of the business, and it is safe to assume that the "honorarium" for practical purposes was the result of the satisfaction of the Operating Corporation for the success of his real estate ventures. The Supreme Court has several times said that a taxpayer has the burden of proving that the Commissioner's determination is wrong. *Welch* v. *Helvering,* 290 U.S. 111, 115; *Helvering* v. *Taylor,* 293 U.S. 507, 515; his decision is prima facie correct; *Wickwire* v. *Reinecke,* 275 U.S. 101, 105. Certainly the taxpayers in the case at bar did not prove that to any substantial degree the "honorarium" was more than an expression of gratitude for exceptional services rendered.

We are indeed acutely aware that such a test goes far to leave the issue always in the hands of the taxing authorities, but it is, as we have tried to show, inherently incapable of exact definition, and we can think of no better standard.

Judgment reversed and cause remanded for further proceedings not inconsistent with this opinion.

HINCKS, *Circuit Judge* (dissenting):

In *Helvering* v. *American Dental Co.,* 318 U.S. 322, 327, it was said: "The narrow line between taxable bonuses and tax free gifts is illuminated by *Bogardus* v. *Commissioner,* 302 U.S. 34, on the one side and upon the other by *Noel* v. *Parrott,* 15 F. 2d 669, as approved in *Old Colony Trust Co.* v. *Commissioner,* 257 U.S. 716, 730." In my analysis the case here is far closer to *Bogardus* than to *Noel.*

In *Bogardus* v. *Commissioner*, 302 U.S. 34, it is true that the majority opinion points to the fact that the recipients of the bounty were never the employees of the disbursing company or its stockholders. But as I read the majority opinion this was at most a makeweight, not at all a decisive consideration. It was said, on page 41, that if the disbursements had been made by the employer, "or by stockholders of that company still interested in its success and in the maintenance of the good will and loyalty of its employees, there *might be ground for the inference* that they were payments of additional compensation." (Emphasis supplied.) This is a far cry from a holding that the result would *necessarily* have been otherwise if the employer-employee relationship had existed at the very moment of the disbursement. And obviously the added weight of this feature was minuscule: the payment came from the stockholders who had enjoyed the economic benefit resulting from the employment—from those who had a day or two before had been the stockholders of the employer-corporation. Indeed, as Judge Hand observed in his opinion below, 88 F. 2d 646, at 648–9, "the intent and motive were precisely the same as though the shareholders had been the employers of the donees, which they were not." The other grounds of distinction advanced by my brothers are even more tenuous. Indeed, in my estimate they tend to support the conclusion of a gift, rather than to militate against it.

In the *Noel* case, referred to in *Helvering* v. *American Dental Co., supra*, as illuminating the dividing line from the other side, there were factors, not present here, which cogently supported the conclusion of compensation. For in *Noel*, as Judge Parker points out, "it affirmatively appears that it [i.e., the questioned payment] was made upon a consideration."

Moreover, in *Noel* it was reported by the corporate "donor" in its income tax return as a salary deduction.

And so, if the distinction between gift and compensation is a problem to be determined on an *ad hoc* basis—as is implicit in the *Bogardus* majority opinion—the instant case, in my judgment, should be classified as a gift: it is within the scope of the *Bogardus* decision.

However, in the *Bogardus* case Justice Brandeis in his dissenting opinion, made a somewhat different approach to the problem. He said:

> "* * * What controls is the intention with which payment, however voluntary, has been made. Has it been made with the intention that services rendered in the past shall be requited more completely, though full acquittance has been given? If so, it bears a tax. Has it been made to show good will, esteem, or kindliness toward persons who happen to have served, but who are paid without thought to make requital for the service? If so, it is exempt.
>
> "We think there was a question of fact whether payment to this petitioner was made with one intention or the other. A finding either in his favor or against him would have had a fair basis in the evidence. It was for the triers of the facts to seek among competing aims or motives the ones that dominated conduct. Perhaps, if such a function had been ours, we would have drawn the inference favoring a gift. That is not enough. If there was opportunity for opposing inferences, the judgment of the Board controls. *Elmhurst Cemetery Co.* v. *Commisioner,* 300 U.S. 37; *Helvering* v. *Tex-Penn Oil Co.,* 300 U.S. 481."

In the case now before us a search "among competing aims or motives [for] the ones that dom-

inated conduct" will reveal evidence of the following facts. The employment relationship had been one that had brought Stanton into close personal contact* with the vestry and wardens of the church and with the directors of the Operating Company several of whom testified that a general feeling of gratitude, rather than a desire to supplement Stanton's salary, had prompted the payment. Stanton's salary in the past had been in no way inadequate;** and the amount given was in no way geared to salary or years served. A vestryman and director of the Operating Company testified: "Mr. Stanton was liked by all the vestry personally. He had a pleasing personality." And the senior warden testified: "We understood that he was going into business for himself. We felt that he was entitled to that evidence of good will." The employment relationship was at an end when the payment was made and the donor derived no benefit therefrom aside from the satisfaction flowing from its expression of gratitude.

If these facts be added to those recited in my brothers' opinion the sum total, it seems to me, would adequately support a finding that "good will, esteem or kindliness," the touchstone of Justice Brandeis' dissenting opinion in *Bogardus,* rather than more complete requital for past services, had dominated the Operating Company in making the payment. And such a finding is implicit in the more general find-

*Obviously, payments to an individual employee whose work has brought him into close personal touch with his employer may more readily be found to emanate from motives of "good will, esteem, or kindliness" than payments to groups of employees who had had no personal contact with the employer. It is this personal feature of the relationship which goes far to explain the cases referred to by my brothers which held that payments to ministers constituted gifts.

**It was almost twice that later provided for his successor.

ing below. In *Bogardus*, the majority of the court thought the determination of the trier had "no support in the primary and evidentiary facts." That is *not* so here, as the evidence just referred to shows. The *Bogardus* minority found that "there was opportunity for opposing inferences," exactly the situation here. That being so, I think we may not disturb the finding of the dominating motive on which the judgment below was based. *Peters* v. *Smith*, 3 Cir., 221 F. 2d 721; *Nickelsburg* v. *Commissioner*, 2 Cir., 154 F. 2d 70.

Surely the finding below was not clearly erroneous within the purview of Federal Rules of Civil Procedure, Rule 52. Findings by a trial judge, just as those by the Tax Court,* may not be disturbed unless clearly erroneous. *Plaut* v. *Munford*, 2 Cir., 188 F. 2d 543; *Smith* v. *Hoey*, 2 Cir., 153 F. 2d 846; *Scott* v. *Self*, 5 Cir., 208 F. 2d 125; *Smythe* v. *Barneson*, 9 Cir., 181 F. 2d 143. In other areas of tax law, questions going to intent have generally been dealt with as questions of fact. See *United States* v. *Wells*, 283 U.S. 102; *Wickwire* v. *Reinecke*, 275 U.S. 101; *Blakeslee* v. *Smith*, 2 Cir., 110 F. 2d 364; *White* v. *Bingham*, 1 Cir., 25 F. 2d 837; *Jahn* v. *Pedrick*, 2 Cir., 229 F. 2d 71; *Keefe* v. *Cote*, 1 Cir., 213 F. 2d 651. See also case note on *Bogardus* v. *Helvering*, 2 Cir., 88 F. 2d 646, 51 Harv. L. Rev. 167. In *Peters* v. *Smith*, *supra*, it was held that a jury finding that a payment was a gift, when made on conflicting evidence, may not be set aside.

---

*26 U.S.C.A. § 7482(a) provides

"(a) *Jurisdiction.*—The United States Courts of Appeals shall have exclusive jurisdiction to review the decisions of the Tax Court, except as provided in section 1254 of Title 28 of the United States Code, in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury: * * *."

Thus I am brought to the conclusion that the holding of my brothers is in conflict with both of the *Bogardus* opinions and exceeds the power of an appelate court over findings by the trier of facts. Nor is the result reached required by the earlier cases in this circuit. Both *Carragan* v. *Commissioner,* 2 Cir., 197 F. 2d 246, and *Nickelsburg* v. *Commissioner, supra,* are distinguishable on their facts. Moreover, in both this court refused to disturb the finding of the trier.

I would affirm.

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BRIEF FOR MOSE
DUBERSTEIN AND SYLVIA
DUBERSTEIN IN
OPPOSITION

FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. [redacted] 376

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

v.

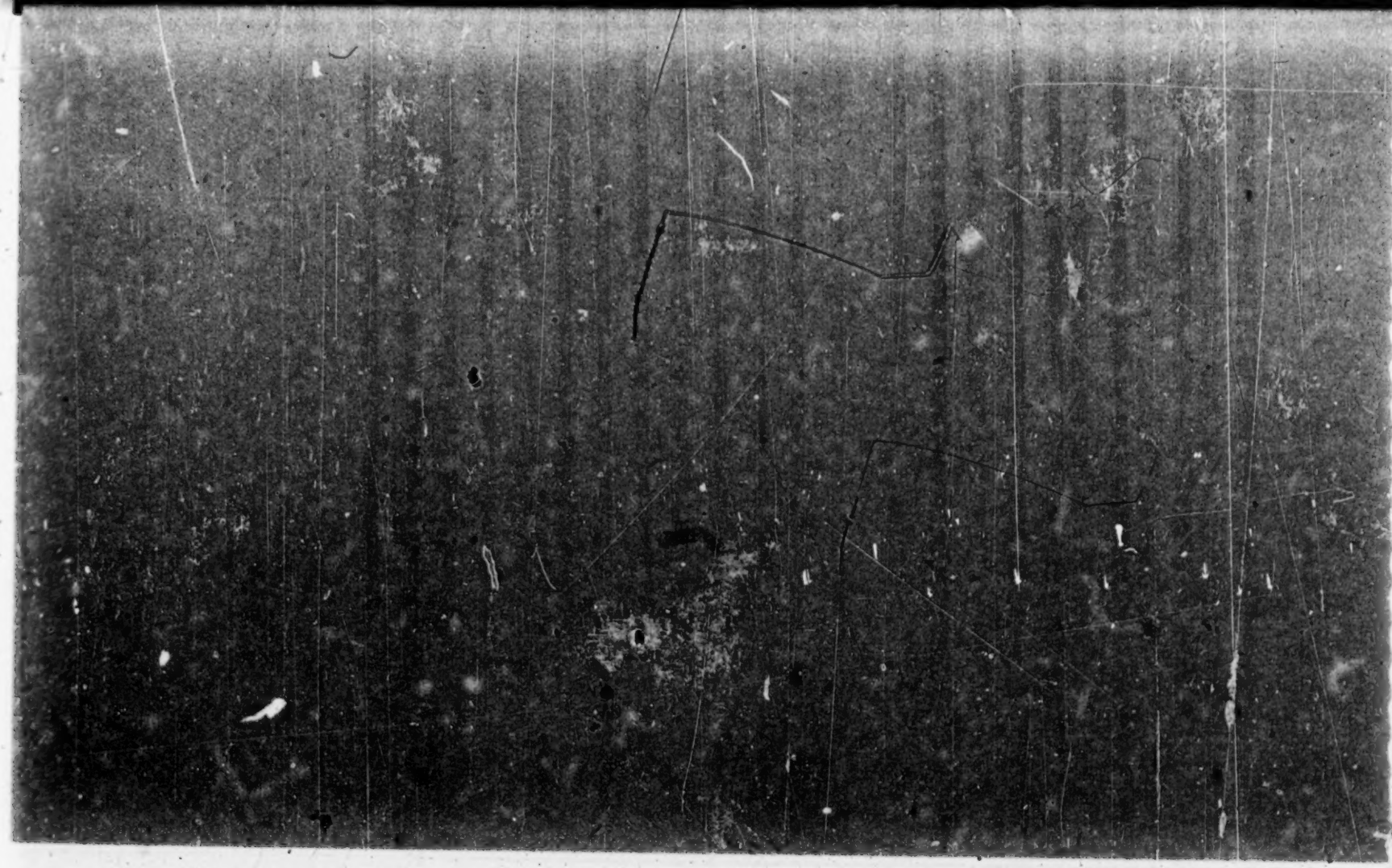
MOSE DUBERSTEIN and SYLVIA DUBERSTEIN,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals For the Sixth Circuit

BRIEF FOR MOSE DUBERSTEIN AND SYLVIA DUBERSTEIN IN OPPOSITION

SIDNEY G. KUSWORM,
403 Keith Building,
Dayton 2, Ohio,
Attorney for Appellants.

THE JOHNSON & HARDIN CO., LAW PRINTERS
CINCINNATI, OHIO



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BRIEF FOR MOSE DUBERSTEIN AND SYLVIA DUBERSTEIN IN OPPOSITION

OPINIONS BELOW

The findings of fact and memorandum opinion of the Tax Court are not officially reported. The opinion of the court of appeals is reported at 265 F. (2d) 28.

JURISDICTION

The judgment of the court of appeals was entered on April 8, 1959. On July 7, 1959, by order of Mr. Justice

Brennan, the time within which to file a petition for a writ of certiorari was extended to and including September 5, 1959. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTION PRESENTED

The taxpayer, in 1951, upon request of a friend of his, gave to the friend whose company did business with the taxpayer's company, some names of possible purchasers of the items the business friend's company wanted to sell, it appearing that the business friend's company did not know what firm or firms handled the items the business friend's company wanted to try to sell. Taxpayer gave him the information and it proved valuable to his business friend's company. The business friend then insisted upon taxpayer taking an automobile as a gift. When the business friend found out from his company's auditor that it would have to pay a tax on the automobile, he wanted to know from his company's auditor how it could avoid paying a tax and was told it could do so by way of a finder's fee. This was done. *(It was purely an afterthought.)* In 1954, the taxpayer learned for the first time that the cost of the automobile had been deducted as a business expense and the Government taxed the taxpayer for the value of the automobile. The question is, under these circumstances, whether the car was income to the taxpayer or a "gift" excludible under § 22(b)(3) of the Internal Revenue Code of 1939.

STATUTES INVOLVED

Internal Revenue Code of 1939 (26 U. S. C., 1952 ed.):

Sec. 22. Gross Income.

(a) General Definition.—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, voca-

tions, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. . . .

(b) Exclusions from Gross Income.—The following items shall not be included in gross income and shall be exempt from taxation under this chapter:

* * * * * * *

(3) Gifts, bequests, and devises.—The value of property acquired by gift, bequest, devise, or inheritance (but the income from such property shall be included in gross income);

* * * * * * *

STATEMENT

Duberstein Iron and Metal Company is a corporation located in Dayton, Ohio. Mohawk Metal Company is a corporation with its principal office in New York. Mose Duberstein, President of Duberstein Iron and Metal Company and Morris Berman, President of Mohawk Metal Company were personal friends. The corporations did business with each other over a period of years. Sometime in 1951 Berman called Duberstein and said that his company had some chemical and plastic products and wanted to know whether Mose Duberstein had any idea as to concerns who handle this type of products. Mose Duberstein gave him the names of some concerns that he thought might be interested in those kinds of products. This was done purely as a matter of friendship. Duberstein expected no monetary reward for telling his friend, Berman, the names of these concerns. Duberstein did not contact these concerns and Berman, at the time, evidently had no idea that he was beholden to Mose Duberstein for suggesting these names. Later on that year, Berman called Duberstein and informed him that

he wanted to give Duberstein an automobile. Duberstein stated that he didn't want an automobile because he had two and besides, Berman or his company owed him absolutely nothing because he had done nothing for them except as a friend he gave the names of some people who might be interested in the products Berman was asking about. However, Berman insisted that Duberstein take the automobile, which he did, and that is the last he, Duberstein, heard of the matter until in 1954, when an examiner for the Internal Revenue Department told Duberstein that he had to pay a tax on the automobile, the fair value of which the agent said was $4,250.00, which tax Duberstein refused to pay, and the matter finally went to the Tax Court by reason of a suit filed by the Taxpayers.

The Tax Court found that the car was income to Mr. Duberstein in the amount of $4,250.00 in the year 1951, and found the Petitioner liable for income tax thereon in the amount of $2,570.48 for the year 1951.

The United States Court of Appeals for the Sixth Circuit reversed. The record in the case is very short. The only witnesses were Mose Duberstein and his accountant, David E. Flagel, and the Government offered no testimony or evidence whatsoever.

The complete testimony is as follows:

Mose Duberstein—Direct

"Q. Mr. Duberstein, state whether or not you are the president of the Duberstein Iron & Metal Company, an Ohio corporation located at Dayton, Ohio? And talk loud so that His Honor can hear you. A. I am.

Q. That isn't very loud. How long have you been the president? A. For 25 years.

Q. Mr. Duberstein, state whether or not your company had during the years 1950 and '51, and prior thereto, business dealings with the Mohawk Metal Corporation? A. Yes, we did.

Q. And what were those business transactions? A. The business transactions with the Mohawk Metal Company were strictly on the basis——

Q. Well, buying and selling what? A. Buying and selling copper, or various other metals.

Q. Now, state whether or not most of these transactions were done by phone? A. All of them, practically.

Q. Did you know Mr. Berman personally? A. Yes, I did.

Q. And how long did you know him, or have you known him? A. I'd say about 7 years.

Q. Now, state whether or not it is a fact that occasionally when you talked to him he would ask you questions about the names of consumers who used certain chemicals, and that if you knew the names of such consumers you'd give them to him? A. That's right. I did.

Q. What were the type of materials, or chemicals that he asked you about? A. Oh, one was plexigas, and another was polyethylene, nickel salts.

Q. Now, state whether or not this information was given to him gratuitously and without any hope of monetary reward or gift of any kind? A. I expected nothing in return.

Q. Talk up. A. I expected nothing in return for——

Q. Now, back in 1951 state whether or not Berman called you with reference to a Cadillac automobile? A. He did and I told him at the time that——

Mr. Biltz: Objection, Your Honor. That is hearsay conversation with Mr. Berman.

By Mr. Kusworm:

Q. State what you said to Mr. Berman, and what Berman said to you.

Mr. Biltz: Objection.

Mr. Kusworm: We think this is very competent.

The Court: The objection is overruled at this time. If I find it is incompetent I can always ignore it.

A. He [Morris Berman] told me that due to the fact that I—the information that I had given him was so

helpful, that he felt that he wanted to give me a present. And I told him he didn't owe me anything. And he said, well, he had a Cadillac car as a gift, and I should send to New York to receive it, which I finally did. But I told him he owed me nothing, and I didn't expect anything for the information, and I didn't intend to be compensated but he insisted that I accept this Cadillac car.

By Mr. Kusworm:

Q. Now, at the time, did you need any automobile? A. No; I had two cars.

Q. What kind? A. I had a Cadillac, and an Oldsmobile.

Q. State whether or not at any time you or any member of your company to your knowledge received from Mohawk or it's auditor or certified public accountant a form No. 1099? A. I never received it.

Q. Showing this transaction. A. Not at all.

Q. Now, what was your custom, and is your custom when any form 1099, or any other forms concerning taxes are sent to your company, or to you by the Government? A. Well, they are immediately turned over, or mailed directly to the auditor, and he handles it from there on.

Q. Had you received form 1099 in 1952 state whether or not you would have contacted Berman immediately? A. Oh, I definitely would.

Q. Why? A. Because I didn't owe anything, any money. This car was strictly a gift, and I would have tried to straighten out the matter with him. Or if I had received that form 1099.

Mr. Kusworn: You may cross-examine.

CROSS-EXAMINATION

By Mr. Biltz:

Q. Mr. Duberstein, this information, I believe you testified, proved valuable to Mohawk. Is that correct? That you furnished them in 1951? A. It was a matter of information. He asked me for information as to where he could dispose of that type of material.

Q. Had you not given him this information would you still have gotten this Cadillac car? A. Oh, I don't——

Q. You don't think so? A. I don't think so.

Q. No. I don't think so either. Do you know anything about how Mohawk treated this item on their income tax return, or—— A. I have no knowledge of that.

Q. You have no knowledge of that. A. No.

Q. Do you have any knowledge of anything with reference to the corporate minutes of the Mohawk Metal Company? A. Not at all.

Q. You made no attempt even after the investigation to find out whether this was income or a gift; is that correct?

Mr. Kusworm: Object.

A. I didn't know that information until 1954.

By Mr. Biltz:

Q. '54? A. Until the Internal Revenue Department contacted me.

Q. What is a form 1099, do you know? A. I'm not too familiar with it.

Q. You are not familiar with it. A. No.

Mr. Biltz: That is all.

REDIRECT EXAMINATION

By Mr. Kusworm:

Q. State whether or not you ever got any form from anybody showing a tax indebtedness to the Government because of a gift? A. No, I never did.

Q. Now, state whether or not after you got this information you contacted Mr. Flagel, and whether or not to your knowledge he made an investigation as you have been interrogated about by the distinguished attorney for the Respondent? A. Well, after I was contacted by the Internal Revenue Department I contacted Mr. Flagel, and he handled the matter from there on in, and he contacted the auditor of the Mohawk Metal Company.

The Court: Who is Mr. Flagel?

The Witness: He's our auditor. He's my C.P.A.
The Court: He's your auditor.
The Witness: That is right.
The Court: Accountant.
The Witness: Our accountant, that's right.
The Court: Very well.
Mr. Kusworm: That's all, Mr. Duberstein,
(Witness excused.)
Mr. Kusworm: I call Mr. Flagel.

David E. Flagel,

called as a witness for and on behalf of the Petitioner, having been first duly sworn, was examined and testified as follows:

The Clerk: May we have your name and address, please?

The Witness: David E. Flagel.

The Clerk: Your address?

The Witness: 327 First National Building, Dayton, Ohio.

DIRECT EXAMINATION

By Mr. Kusworm:

Q. Mr. Flagel, you are a Certified Public Accountant with offices in the First National Bank Building at Dayton, Ohio? A. Yes, sir.

Q. Now, you have to talk loud. The Judge has told you the acoustics here are bad. A. Yes, sir.

Mr. Kusworm: I happen to know that myself, Your Honor, from previous experience.

By Mr. Kusworm:

Q. How long have you been a Certified Public Accountant? A. Since 1936.

Q. State when Mose Duberstein of the Duberstein Iron & Metal Company first contacted you about the automobile in question. A. Sometime during 1954.

Q. State whether or not you were ever given by Mose Duberstein or the Duberstein Iron & Metal Company a form 1099? A. No.

Q. State what the custom is of Duberstein Iron & Metal Company and/or Duberstein with reference to turning such notices over to you. A. He usually

turns over to me any papers or matters pertaining to taxes so that I can take care of them from that point on.

Q. Now, in 19——

The Court: Just a minute. You take care of the tax accounts and returns of both the corporation and Mr. Duberstein individually?

The Witness: Yes, sir; for the corporation and for all of the personal returns.

The Court: Very well. Very well.

By Mr. Kusworm:

Q. Now, Mr. Flagel, when this matter was reported to you by Duberstein and/or the Duberstein Iron & Metal Company, state what you did with reference to getting the story of the transaction from Mose Duberstein. A. Well, first——

Mr. Biltz: From Mose Duberstein?

Mr. Kusworm: Yes.

Mr. Biltz: I object, Your Honor. Those would be self-serving declarations.

Mr. Kusworm: I'm asking what he did.

The Court: I understand that; I understand he will go ahead and give me the whole picture. State what you did in regard to Mr. Duberstein.

A. (Continued) Well, I discussed the matter first with Mr. Duberstein to get the whole story from him before discussing it further with the agent, with the internal revenue agent.

By Mr. Kusworm:

Q. Now, what did Duberstein tell you? A. He explained that the automobile was unquestionably a gift, and one of the questions which I asked was whether he had ever received any information on form 1099 or any other information. Mr. Duberstein explained to me that he had talked to Mr. Berman many times during the interim between '51 and '54, and the question of compensation or taxability of the Cadillac had never arisen.

The Court: Now, then, after that did you contact Mr. Berman, or Mohawk in regard to it?

The Witness: Yes, sir.

Mr. Kusworm: I am coming to that.

A. (Continued) I wrote a letter to Mr. Berman——

By Mr. Kusworm:

Q. Now, in answer to His Honor's questions I want you to read a letter. State whether you sent it by registered mail to Mr. Berman, and exactly word for word let the record show what that letter contained. A. Well, first I'd like to mention—Well, all right.

I wrote a letter on May 4th, 1954, and sent it to Mr. Morris Berman, 30 West 90th Street, New York, and it was sent special—it was sent registered.

Q. Have you got the receipt? A. We have the receipt for it.

Q. Read it. A. "Dear Mr. Berman: Mr. Mose Duberstein, who has been my client for many years, suggested that I write to you in connection with the audit by the Internal Revenue Department of his 1951 personal Federal income tax return.

"The agent making the examination has the information from the New York office to the effect that the Mohawk Metal Corporation paid Mose Duberstein $4,250.00 during the year 1951 in the form of a Cadillac automobile, and deducted this item as an expense.

"In order to verify this, I corresponded directly with your accountant, Mr. Seymour Gorin, in Philadelphia. On May 1, 1954 he advised me that the Mohawk Metal Corporation did deduct this item as an expense on its Federal income tax return for that year. Also, that an information return on form 1099 was filed reporting this payment as income to Mose Duberstein. Mr. Gorin also gave me an excerpt of a letter which was given by Mohawk to the Internal Revenue Department in New York on September 9, 1953 stating that this payment was made to Mose Duberstein in the nature of a finder's fee.

"I have discussed this matter at great length with Mose Duberstein and he has assured me that it was his definite understanding and your understanding, also, that this car was given to him strictly as a gift. He at no time considered himself as employed by Mo-

hawk, had no agreement for compensation, and there was never any legal liability to pay him. As a matter of fact, he would not have considered accepting the car under any circumstances other than as a gift. On the basis of compensation he would incur a very substantial tax liability. Mose Duberstein never considered that he as an individual was rendering any service to Mohawk. All business transactions in the past have always been between Mohawk Metal Corporation and Duberstein Iron & Metal Company. When Mose Duberstein was told of the Cadillac purchased for him, he naturally assumed it was a gift and accepted it as such.

"I would appreciate hearing from you regarding this matter at your earliest convenience.

"Very truly yours."

Q. Was that letter ever answered? A. No, sir.

The Court: You've read the letter in full?

The Witness: Yes, sir.

The Court: Very well.

By Mr. Kusworm:

Q. Now, further carrying out the question of His Honor, did you follow through on this matter with Mr. Gorin, who was the accountant for Mohawk, and let's tell His Honor what you did about that. A. I, also, corresponded with Mr. Gorin. I wrote to Mr. Gorin several times. I finally received one answer.

The Court: Well, rather than read those into the record why don't you offer them, offer copies of the letters?

Mr. Kusworm: Very well, Your Honor.

The Court: Or offer the——

Mr. Kusworm: We will offer them.

The Court: The originals, I take it, are not in your hands.

Mr. Kusworm: They are not. But we will offer in evidence, Your Honor, to show the actions of the Certified Public Accountant for the tax payer——

The Court: Do you have any objection?

Mr. Biltz: I would like to see that last letter he was going to read.

The Court: You have no objection if these copies——

Mr. Kusworm: I want to show the letter to the accountant first.

The Witness: Well, I wrote several letters to him, Mr. Kusworm. Which one——

Mr. Kusworm: Now, this——

The Witness: I wrote my last letter on August 26, I believe, of 1956.

Mr. Kusworm: Here's the letter that he just——

By Mr. Kusworm:

Q. There was one that you wrote July 2nd, 1955. Is that right? A. Yes, sir.

The Court: If you gentlemen can agree, that is, if you have no objection, it would be better to have the letter, itself, in the record, than reading it.

Mr. Biltz: Yes, it would. I would like to see that last letter.

Mr. Kusworm: Yes. We would like to offer in evidence, Your Honor, all of these letters.

The Court: And the reply.

Mr. Kusworm: And the reply. For the reason that——

By Mr. Kusworm:

Q. You, Mr. Flagel, had a talk with Mr. Gorin, didn't you? A. Several talks.

Q. Several talks with him. And what did Gorin say? A. Gorin said substantially—well, the last talk I had with him was on September 6 of 1956.

Q. What did he say about the reason why this was put on Mohawk's books? A. Well, he had talked with Mr. Berman, and explained to Mr. Berman that if the Cadillac was recorded as a gift it would not be deductible as such. Mr. Berman wanted to know how it would be deductible, and——

Mr. Biltz: Objection, Your Honor. He's——

The Court: It will be sustained.

If Mr. Biltz doesn't object to those letters, I'll permit you to offer copies.

Mr. Biltz: I believe I'll object to the letters, too, Your Honor. They are self-serving declarations, they

are hearsay, and they are trying to prove the donor's intent by statements of the donee, his accountant. They have neither the donor nor his accountant here.

The Court: Well, the only testimony—I am not going to permit you to state what—Who is this man with Mohawk?

Mr. Kusworm: Gorin.

The Court: What Gorin said to you, but if you have any letters there——

Mr. Kusworm: Yes, we have a letter.

The Court: Over his signature, I thought perhaps you could agree that they could be introduced into evidence.

Mr. Kusworm: We have letters that Flagel wrote Gorin in which Flagel corroborated what Gorin told him personally over the phone.

The Court: Have you looked at that letter?

Mr. Biltz: I've looked at that letter, that one letter of May 1st is all right. We have no objection to it.

Mr. Kusworm: No, you haven't any objection to it. Then, we want all the correspondence. I think the Court ought to have all the facts in this case.

The Court: Well, have you other letters there?

Mr. Kusworm: Yes, Your Honor.

The Court: Take a look at them, and see if you have objection to the other letters. I mean Mr. Biltz, I don't care about this man. Mr. Biltz, look at those letters.

Mr. Kusworm: He can look at the whole file, Your Honor. We have nothing to hide in this case. I'm willing to introduce Flagel's file on this case. In other words, I think that this Tax Court ought to have all the facts.

The Court: Well, in order for me to get the facts I've got to have—these conversations you are going to outline to me, I don't know whether they would testify that those are facts or not.

Mr. Kusworm: They are all reflected in the letters, Your Honor.

The Court: Well, I want the letters.

Mr. Kusworm: We want to introduce the letters. We want to introduce the whole file.

The Court: Well, the Court is trying to find out whether or not counsel for the Respondent will object to those letters. If he don't why, we'll have them in evidence.

Mr. Biltz: We would like Counsel to take each letter and introduce each letter separately, letter by letter, so that we could determine at the time which letters we would like to have in evidence and which ones we have objection to.

The Court: Well, if you're going to object to any of those letters from Mr. Gorin—is that his name? I don't want you to object to one——

Mr. Biltz: I think we should object to all of them. They are hearsay.

Mr. Kusworm: Well, they are letters between the parties, or their representatives, Your Honor, and it seems to me that the Government would want Your Honor to know all the facts in this case.

The Court: I know, but that is not testimony. They don't have an opportunity to cross-examine the witnesses or anything of the kind. You know that those are not proper evidence, and unless they will waive their objection, they are not admissible. I can't admit them. They are not sworn to, and, then, the Respondent doesn't have any opportunity to cross-examine them, or get them to explain their statements or anything of the kind.

Now, if you expected to use them as witnesses you should have had them here.

Mr. Kusworm: Well, now, if Your Honor please, I would like to explain something to you. To have Berman here would have been futile. Berman didn't even answer that. Now, I'm going to come to Gorin—I am coming to Gorin. We contacted Gorin on the basis of what he said to Flagel, and Gorin said he wouldn't come here.

The Court: Well, you could have subpoenaed him.

Mr. Kusworm: I know we could have subpoenaed him, but I know what he would have repudiated.

The Court: You could take his deposition.

Mr. Kusworm: That's right, but he would have repudiated it. And the bald statement of the record right now is that this was purely and simply a gift, and let the Government refute our testimony on that point if they are objecting to the letters.

I want to ask you a question.

The Court: I will permit Mr. Berman's testimony to stand, but I am not going to permit the introduction of those letters at this time.

Mr. Kusworm: I understand that, Your Honor.

The Court: I am not going to permit you to read them into the record either.

Mr. Kusworm: I understand that, Your Honor. But you will permit me to take an exception.

The Court: Yes. I will note your exception.

Mr. Kusworm: Thank you.

By Mr. Kusworm:

Q. I want to ask you this final question: Had you gotten form 1099 what would you have done with respect to that matter? A. I would have——

Q. In 1952. A. I would have advised Mr. Duberstein that that item was income to him for the year '51 and included it as such in his 1951 return.

Mr. Kusworm: You may cross-examine.

CROSS-EXAMINATION

By Mr. Biltz:

Q. If you would have later received the form 1099 would you have still—would you have filed an amended return? A. How much later?

Q. A couple years, two years. A. I would have advised Mr. Duberstein about it, and if it was determined to be income to him for the year '51, an amended return would have been filed, yes.

Q. Did Mr. Berman advise you that he had sent that 1099 to Mr. Duberstein? A. I never talked with Mr. Berman, or I never received an answer to my registered letter.

Q. Do you know whether Mohawk sent a form 1099? A. I don't know.

Q. You have no knowledge of that. A. I do know this, but it has to be through my telephone conversation with Mr. Gorin. Now, he explained to me that he did send 1099s out and he sent them all by registered mail, and he couldn't find the receipt for this particular 1099 although he told me he had receipts for all the other 1099s that he sent out.

Mr. Biltz: That is all.

Mr. Kusworm: That is all.

(Witness excused.)

Mr. Kusworm: We rest.

The Court: Before you rest I want to ask Mr. Duberstein, what did you do with this Cadillac, Mr. Duberstein, after you received it?

Mr. Duberstein: What did I do with it? I used it officially.

The Court: Well, you had a Cadillac, you had an Oldsmobile, so you kept all three of them.

Mr. Duberstein: Yeah, I kept all three of them.

The Court: Very well.

The Petitioner rests?

Mr. Kusworm: The Petitioner rests.

The Court: Very well.

Mr. Biltz: The Respondent had subpoenaed a witness but the witness, we didn't give him enough time to appear, and we don't believe he is necessary anyhow, and the Respondent rests."

ARGUMENT

In the light of this testimony, the United States Court of Appeals for the Sixth Circuit decided as follows:

"UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MOSE DUBERSTEIN AND SYLVIA DUBERSTEIN, HUSBAND AND WIFE, PETITIONERS,

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT
ON PETITION FOR REVIEW OF THE TAX COURT

Decided April 8, 1959

Before MARTIN, Chief Judge; MILLER, Circuit Judge; and O'SULLIVAN, District Judge.

O'SULLIVAN, District Judge. The sole question in this case is whether a Cadillac automobile received by the taxpayer Duberstein in the year 1951 from Mohawk Metal Corporation, was a gift or taxable income. The Tax Court found that it was not a gift, and affirmed the action of the Commissioner of Internal Revenue in assessing a deficiency against Duberstein by including in his 1951 income the sum of $4,250.00, the fair market value of the Cadillac.

Duberstein was President of Duberstein Iron and Metal Company of Dayton, Ohio, and Morris Berman was President of Mohawk Metal Corporation of New York. These two corporations had done business with each other in the buying and selling of various metals over a period of years. Duberstein and Berman were personally acquainted. On some occasions when these two corporate officers were talking to each other, Berman would ask questions about names of consumers who used various chemicals. Duberstein gave Berman the names of such consumers known to Duberstein. At some time in the year 1951, Berman called Duberstein and told him that some of the information given to Berman was so helpful that he felt he wanted to give

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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 376

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

MOSE DUBERSTEIN AND SYLVIA DUBERSTEIN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The memorandum findings of fact and opinion of the Tax Court (R. 26–29) are not officially reported. The opinion of the court of appeals (R. 30–34) is reported at 265 F. 2d 28.

JURISDICTION

The judgment of the court of appeals was entered on April 8, 1959 (R. 29). On July 7, 1959, by order of Mr. Justice Brennan, the time within which to file a petition for a writ of certiorari was extended to and including September 5, 1959 (R. 35). The petition was filed on September 4, 1959, and granted on December 14, 1959 (R. 35). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

The taxpayer, upon request, gave to a business corporation the names of potential customers. The information proved valuable and the corporation reciprocated by giving the taxpayer a Cadillac. The question is whether the car was income to the taxpayer or a "gift" excludible from income under § 22 (b) (3) of the Internal Revenue Code of 1939.

STATUTE INVOLVED

Internal Revenue Code of 1939 (26 U.S.C., 1952 ed.):

> SEC. 22. GROSS INCOME.
>
> (a) *General Definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *
>
> (b) *Exclusions from Gross Income.*—The following items shall not be included in gross income and shall be exempt from taxation under this chapter:
>
> * * * * *
>
> (3) *Gifts, bequests, and devises.*—The value of property acquired by gift, bequest, devise,

or inheritance (but the income from such property shall be included in gross income);

* * * * *

STATEMENT

Respondent[1] was the president of the Duberstein Iron & Metal Company of Dayton, Ohio. He was personally acquainted with Morris Berman, the president of the Mohawk Metal Corporation, the two companies having done business with each other over a period of years. The business transactions between the two companies (buying and selling metals) were conducted primarily by telephone. In the course of such conversations, Berman occasionally asked respondent for the names of concerns that used certain chemicals sold by Mohawk, and respondent supplied the names of those he knew. Respondent expected nothing in return for such information (R. 14). In 1951, Berman called respondent, and the following conversation, as related by respondent, took place (R. 14):

> He told me that due to the fact that I—the information that I had given him was so helpful, that he felt that he wanted to give me a present. And I told him he didn't owe me anything. And he said, well, he had a Cadillac car as a gift, and I should send to New York to receive it, which I finally did. But I told him he owed me nothing, and I didn't expect anything for the information, and I didn't intend to be compensated but he insisted that I accept this Cadillac car.

[1] Mose Duberstein will be referred to as the sole respondent, his wife being a party only because she filed a joint income tax return with him.

Respondent testified that he didn't think he would have been given the car had he not furnished the information to Mohawk (R. 15).

Mohawk deducted the cost of the car on its income tax return as a business expense in the nature of a "finder's fee" and filed an information return (Form 1099) reporting it as compensation paid respondent (R. 19, 26). Respondent treated the car as a gift and did not report it as income.[2]

In deficiency proceedings, the Tax Court upheld the Commissioner's determination that the car was taxable income to respondent, finding no evidence that it was intended as a gift (R. 26–29). The court of appeals, with Chief Judge Martin dissenting, reversed, holding that respondent's account of the telephone conversation was "clear and distinct evidence of the donative intent of Berman" and, being uncontradicted, required a finding of a gift excludible from income under § 22(b)(3) of the Internal Revenue Code of 1939 (*supra*, pp. 2–3).

SUMMARY OF ARGUMENT

1. The primary question in this case is whether the

[2] When respondent's return was later questioned, his accountant (Flagel) spoke to Mohawk's accountant about Mohawk's treatment of the item. Asked what the latter had said about the reason why the item was recorded as a finder's fee, Flagel testified (R. 21):

> Well, he had talked with Mr. Berman, and explained to Mr. Berman that if the Cadillac was recorded as a gift it would not be deductible as such. Mr. Berman wanted to know how it would be deductible, and——.

Although an objection to the testimony as hearsay was sustained, it was relied on by the court of appeals (R. 33) and we do not object to its use here.

characterization of a voluntary payment as a gift or income turns upon the payor's *motive*, in the sense of the reasons why he makes the payment, or upon his *intent*, in the sense of what he intends the payment to be. Both courts below thought intent controlling, disagreeing only on whether the fact that Berman called the payment a "gift" at the time (showing a "donative intent") or the fact that the corporation later deducted it as a "finder's fee" (showing an intent to compensate) more accurately revealed the payor's "intent." We eschew that controversy and will assume that Berman, to the extent that he had the capacity to do so, "intended" the payment "as a gift". Our position is rather that it is motive, not intent, that is controlling and that the reason for the payment here (Mohawk's gratitude for the valuable information given it by respondent) requires its characterization as compensation.

2. As used in property or contract law, "intent" refers to the legal relationships intended to be created by an act, and "donative intent" means simply the intent to convey full beneficial ownership, as distinguished, for example, from an intent to make a loan or to create a trust. Since the transfer here would admittedly have the same effects upon the legal relationships between the parties whether it was intended "as compensation" or "as a gift," it is evident that it was not in that sense that the courts here used "intent." Rather, "intent" was used to mean a desire, not that any act should be done differently or have any different consequences, but only that the thing

done should "be" one thing or another without otherwise affecting its consequences.

We submit that "intent" in that sense is not a meaningful concept and that a statement by a payor that "I intend the payment to be a gift rather than compensation" can reflect, at best, only the payor's conclusion that the payment qualifies as a gift under the tax definition or, at worst, simply the payor's desire that it not be taxable. Clearly, neither is relevant to the proper tax treatment of the payment, and in our view the first step to a meaningful analysis of the problem is to discard the "intent" formulation and focus instead on the only substantial differentiating element of voluntary payments—namely, the reasons why the payor makes the payment, *i.e.*, motive. In fact, we believe, this Court has already held as much in *Commissioner* v. *LoBue*, 351 U.S. 243, and all that remains to be done is to make that decision's meaning unmistakably plain by rejecting once and for all the futile search for "intent".

3. If motive is, as we contend, controlling here, it clearly requires the characterization of the payment to respondent as compensation. From the record, there is no doubt that the reason for the payment was simply Mohawk's gratitude for the commercially-valuable information given it by respondent, a gratitude that involved, not the personal emotions of the payor, but only the common sense of obligation to reciprocate for an economic benefit received from another. If any voluntary payment can be compensation, then one so motivated must be, for no more direct causal relationship between the performance of the

act and the receipt of the payment seems possible without the payment having been expressly bargained-for or anticipated.

ARGUMENT

I

INTRODUCTION

It has long been accepted doctrine, and is not questioned here, that a payment made without obligation and not in exchange for a bargained-for consideration is not necessarily a "gift" within the meaning of the § 22(b)(3) exclusion and may be taxable as income.[3] The problem posed by this case, in common with *United States* v. *Kaiser*, No. 55, and *Stanton* v. *United States*, No. 546, is that of distinguishing between those voluntary payments which are gifts for Federal income tax purposes and those which are not.

The aspect of the problem most sharply presented by this case is that of identifying the kind of facts upon which the legal conclusion depends. More specifically, the primary question in this case is which element of a payment should control its characterization as a gift or as income: the "motive" of the payor, in the sense of the reasons why he decides to make the payment; or the "intent" of the payor, in the sense of what he intends the payment to be. The evidence in this case as to each of those elements was as follows:

[3] *E.g.*, *Old Colony Trust Co.* v. *Commissioner*, 279 U.S. 716, 730; *Bogardus* v. *Commissioner*, 302 U.S. 34. The statements in *Bogardus* that "gifts" and "compensation" are mutually-exclusive categories and "there can be no such thing under the statute as a taxable gift" (pp. 39–40) are not to the contrary, for the Court was there referring to "gifts" *within the meaning of* § 22

Motive: Berman, the president of Mohawk, told respondent (as recounted by him) that "due to the fact that I—the information that I had given him was so helpful, that he felt that he wanted to give me" something (R. 14). Respondent didn't "think" he would have been given the car had he not given Mohawk the information (R. 15).

Intent: Berman told respondent that he wanted to give him "a present" and that he had a Cadillac "as a gift" (R. 14). The court of appeals also found in the record an indication that Berman spoke of the car as a "gift" in later talking to Mohawk's accountant (R. 33).[4] Mohawk deducted the payment on its income tax return as a "finder's fee," and filed information forms reporting the payment to respondent (R. 19, 26).

To both courts below, although they arrived at opposite results, the element of the payment that controlled its characterization was the "intent" with which it was made. In the Tax Court's view, the testimony that Berman had called the payment a "gift" was overcome by the treatment of the payment on the books of the corporation and its deduction on the tax return, which it thought tended strongly "to negate any donative intent of the payor" (R. 28). The court of appeals, on the other hand, found in Berman's contemporaneous statement "clear

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(*b*)(*3*), and not to common law concepts of gifts. All the statement meant was that if a payment were excluded from income by § 22(b)(3) it could not be brought back into income by another route, so that the sole question was the application of § 22(b)(3)."

[4] Based on the testimony set forth in note 2, *supra*.

and distinct evidence of the donative intent of Berman at the time" and held that, there being a donative intent then, a subsequent "change of mind" by the donor could not change the character of the payment (R. 32).

It is not our purpose in this brief to enter into the area of disagreement between the Tax Court and the court of appeals—whether what Berman called the payment at the time or the way in which the corporation reflected it on its books more accurately reveals the "intent" with which the payment was made—and we assume with the court of appeals that Berman, so far as he was able to do so, "intended" the payment "as a gift." Our position is rather that the payor's "intent," in that sense, is irrelevant, and that it is upon the reasons for the payment, *i.e.*, motive, that its characterization should turn. We shall show, finally, that the reasons for the payment here preclude its characterization as a "gift".

II

WHETHER A PAYMENT IS A "GIFT" FOR FEDERAL INCOME TAX PURPOSES DEPENDS ON THE REASONS WHY IT WAS MADE, NOT ON WHAT IT WAS "INTENDED" TO BE

1. In contract or property law, "intent" is normally used to denote the legal relationships desired to be created by an act—*e.g.*, an intent to create a binding contractual obligation. It is in that sense that "donative intent" or an intent "to make a gift" is generally used, meaning simply an intent to convey a beneficial interest in property without imposing any duties upon, or affecting any other rights of,

the recipient. Upon its presence or absence depends, for example, whether the action is effective to convey title or only possession (a bailment); whether the transferee receives an unrestricted beneficial interest or must hold the property for designated uses (a trust); whether the transferee is under a duty to make an equivalent repayment (a loan); or whether a pre-existing obligation of the payor survives the payment or is discharged (a payment of a debt).[5]

It is obvious, of course, that it was not in that sense that "donative intent" was used by the courts here, for it was unquestioned that the transfer would be equally effective to pass title whether it was intended "as compensation" or "as a gift". On the other hand, since the common premise of both courts was that, with given reasons for making the payment, Mohawk could nevertheless "intend" it either "as a gift" or "as compensation," "intent" must refer to something different from the reasons for the decision to perform the act. Thus, "intent" as used here does not mean an intent that any act should be done differently or have any different consequences, but only that the thing done should "be" one thing or another without otherwise affecting its consequences.

We submit that in looking for such an "intent" the courts are looking for something that does not exist—*i.e.*, that an intent to do an act "as" one thing or another, when both the act and its consequences are

[5] For examples of that usage, see Scott, *Trusts* §§ 23, 25, 31, 125 (2d ed. 1956); 2 Williston, *Contracts* § 439 (Rev. ed. 1936); Thornton, *Gifts and Advancements* §§ 70, 234 (1893).

to be the same, is not a meaningful concept. That becomes evident from an examination of what a payor might mean by the statement that "I intend the payment to be a gift and not compensation." In our view, that statement, however sincerely said or felt, can only reflect (1) the payor's habits of speech; (2) his choice of a euphemism; (3) his conclusion that the payment in fact qualifies as a gift under the tax or some other definition; or (4) his recitation of words he has been told will make the payment nontaxable. So analyzed, it is evident that such a statement (or state of mind) has no relevance to the proper tax treatment of the payment, yet it is precisely upon such accidents (or choices) of language that the result must ultimately turn if "intent" is to be the test.

It is, we believe, primarily because the lower courts have posed the question as one of "intent" that the decisions in this area, for all of their number, have failed to develop meaningful standards of decision.*

* By and large, the opinions in this area do not articulate the grounds for decision beyond listing the admitted evidentiary facts as "evidence", and then drawing a conclusory "inference" of "intent". Being unable to define what they mean by "intent", however, the courts have understandably been unable to agree on what is the best "evidence" of it. It has been held, for example, to be important by some courts but immaterial by others: that the payor deducted the payment (compare *Willkie* v. *Commissioner*, 127 F. 2d 953, 956 (C.A. 6), certiorari denied, 317 U.S. 659; *Bausch's Estate* v. *Commissioner*, 186 F. 2d 313, 314 (C.A. 2); *Poorman* v. *Commissioner*, 131 F. 2d 946, 949 (C.A. 9); *Silverman* v. *Commissioner*, 28 T.C. 1061, 1066; with *Bounds* v. *United States*, 262 F. 2d 876, 882 (C.A. 4); *Hellstrom* v. *Commissioner*, 24 T.C. 916, 919); that the payments were not ratified by the stockholders (compare *Noel* v. *Parrott*, 15 F. 2d 669, 671 (C.A. 4), cer-

In our view it is an essential first step to any further clarifying developments that the formulation of the question as one of the payor's "intent" be discarded and attention be focused on the more substantial differentiating aspects of voluntary payments.

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tiorari denied, 273 U.S. 754; *Botchford* v. *Commissioner*, 81 F. 2d 914, 916 (C.A. 9); *Fitch* v. *Helvering*, 70 F. 2d 583, 586 (C.A. 8); *Yuengling* v. *Commissioner*, 69 F. 2d 971, 972 (C.A. 3); *Walker* v. *Commissioner*, 25 T.C. 832, 837; with *Lunsford* v. *Commissioner*, 62 F. 2d 740, 742 (C.A. 6); *Macfarlane* v. *Commissioner*, 19 T.C. 9); that the widow of an employee had not herself performed services (compare *Bounds* v. *United States*, *supra*; *Lunsford* v. *Commissioner*, *supra*; *Luntz* v. *Commissioner*, 29 T.C. 647, 650; with *Simpson* v. *United States*, 261 F. 2d 497, 501 (C.A. 7), certiorari denied, 359 U.S. 944; *Varnadoe* v. *Allen*, 158 F. 2d 467, 468 (C.A. 5), certiorari denied, 330 U.S. 821; *Fisher* v. *United States*, 129 F. Supp. 759, 762 (D. Mass.)); and that death benefits paid to a widow or the employee's estate were based on the amount of his salary (compare *Simpson* v. *United States*, *supra*; *Bausel's Estate* v. *Commissioner*, *supra*; *Willkie* v. *Commissioner*, *supra*; *Jackson* v. *Commissioner*, 25 T.C. 1106, 1111; with *Bounds* v. *United States*, *supra*; *Hellstrom* v. *Commissioner*, 24 T.C. 916, 919). Perhaps most unclear of all is the weight given to the payor's own characterization of the payment as a gift or as compensation, which may from time to time be controlling, significant, inconclusive, or immaterial. See, *e.g.*, the present case; *Botchford* v. *Commissioner*, *supra*; *Bounds* v. *United States*, *supra*; *Wallace* v. *Commissioner*, 219 F. 2d 855, 858 (C.A. 5); *Lincoln Nat. Bk.* v. *Burnet*, 63 F. 2d 131, 133 (C.A. D.C.).

Nor is there even agreement over the nature of the ultimate question as one of "fact", subject to review only under the "clearly erroneous" standard or to be left to the jury, or as one of law or of mixed law and fact, on which the appellate courts may draw their own conclusions from the evidentiary facts. Compare *Peters* v. *Smith*, 221 F. 2d 721 (C.A. 3); *Neville* v. *Brokrick*, 235 F. 2d 263, 266 (C.A. 10); *United States* v. *Bankston*, 254 F. 2d 641, 642 (C.A. 6); with *Bogardus* v. *Commissioner*, *supra*; *Bounds* v. *United States*, *supra*; *Simpson* v. *United States*, *supra*; *Willkie* v. *Commissioner*, *supra*.

2. If some but not all voluntary payments are gifts, the only meaningful basis for differentiating among them, we submit, is the payor's motive, the answer to the question "Why did the payor decide to make the payment?". The difference between a Christmas check given to a son and one given to an employee is not that the payor does not "intend" the payment as a gift in both cases—to the extent that he is able, he very likely does—but that one is prompted solely by personal affection towards the payee and the other, at least usually, by either anticipated benefit to the payor (encouraging the particular employee to remain or generally creating employee good will) or his sense of gratitude for the valuable services performed by the payee. And if one payment is a gift and the other compensation, it must be because of that difference in the reasons for the payment.

Although the lower courts seem to have overlooked their implications, the recent decisions of this Court, we believe, fully support our analysis and make clear that it is the reasons why a voluntary payment is made, and not what it is intended "to be," that should control its characterization. In *Robertson* v. *United States*, 343 U.S. 711, 713–714, for example, a gift was alluded to as a payment given "out of" (*i.e.*, motivated by) "affection, respect, admiration, charity or like impulses." Even more significant is the decision in *Commissioner* v. *LoBue*, 351 U.S. 243, holding employee stock options to be taxable as compensation. Lower court decisions had held that the taxability of a stock option depended on whether it was intended "as compensation" or only to give the employee "a

proprietary interest in the corporation." This Court found the distinction in terms of "intent" to be without substance. The options, the Court held, could not be "gifts" because there was no indication "of the kind of detached and disinterested generosity that might evidence a 'gift' in the statutory sense" and because, as the Tax Court had found (but not considered to be controlling), the option plan "was designed to achieve more profitable operations" by increasing, through their stock ownership, the employees' incentives (p. 246). That is, the options were not gifts simply because the reason for giving them was the anticipated benefit to the business rather than a gift motive such as "detached and disinterested generosity." And, since the options given LoBue were "prompted by the employer's desire to get better work from him," they were properly classifiable as "compensation for personal service" within the meaning of § 22(a) (p. 247), despite the findings below that they were not "intended" as compensation.

LoBue, we submit, clearly establishes motive as the controlling fact in the characterization of voluntary payments—an approach to the problem which we have tried to show is the only meaningful one. To the extent that the rationale of the Court's earlier decision in *Bogardus* v. *Commissioner*, 302 U.S. 34, in which the test was phrased as one of the donor's "intent",[7] is inconsistent, it has thus already been dis-

[7] The extent to which the formulation of the issue as one of intent influenced the final decision in *Bogardus* is difficult to tell, for at times the Court, without distinguishing the con-

placed by *LoBue*. All that remains to be done, we believe, is for the Court to clarify that development for the guidance of the lower courts and to discard once and for all the futile search in these cases for "intent".

III

THE REASONS FOR THE TRANSFER HERE REQUIRE ITS CHARACTERIZATION AS COMPENSATION

As we show in our brief in *Kaiser* (pp. 26–30), the opinions of this Court have marked out, at least in general terms, the differences in motivation that distinguish gifts from income. Gifts are payments motivated by "affection, respect, admiration, charity or like impulses" (*Robertson*) or by "detached and disinterested generosity" (*LoBue*). Where, however, the payment is motivated solely by the payor's receipt of commercially-valuable services from the payee, and may thus properly be characterized as given "for services" (*Robertson*) and not "for nothing" (*Commissioner* v. *Jacobson*, 336 U.S. 28, 49, 50, 51), it is not a gift and must be treated as compen-

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cepts, spoke of factors seemingly going to motive rather than intent—*e.g.*, the lack of any moral duty or anticipated benefit (p. 41) and the sense of "spontaneous generosity" by which the stockholders were moved (p. 42). It is fair to say, however, that that formulation obscured the analysis and was responsible for the failure to articulate the difference, if any, between the stockholders' motivation there and the motivation for any other voluntary payment prompted by gratitude for valuable services. While it may be possible to articulate such a difference, we think that, rather than attempt now to rationalize *Bogardus* in new terms, it ought to be recognized simply that it reflected an approach that has since been rejected by this Court and is no longer of value as precedent.

sation. The reasons for the payment here, we will show, clearly bring this case within the latter category.

1. Solely from the business context of the transaction it is clear that the motives for the payment here were of a business, not a personal, nature. That is not a mere inference, however, for the record directly establishes as much. The only evidence going to the reason why respondent was given the automobile was his testimony that Berman had told him that "due to the fact that I—the information that I had given him was so helpful, that he felt that he wanted to give me a present" (R. 14).* That statement makes clear beyond dispute that the payment was prompted solely by Mohawk's gratitude for the valuable business information supplied by respondent. Respondent's contrary contention that it "was purely out of friendship that the car was given" (Br. in Opp. 24) is simply unsupported by anything in the record. The only evidence remotely relevant—respondent's testimony that he had "known" Berman for seven years (R. 14)—does not establish even that respondent and Berman were more than business acquaintances, much less that it was Berman's affection for him rather than the corporation's business gratitude for respondent's services that prompted the payment. And since the burden of proof was on respondent, we need not even invoke the presumption that, the payment having been made with corporate funds, it was paid for legitimate business reasons and

* Corroborated by respondent's own impression that he would not have been given the automobile had he not given Mohawk the information (R. 15).

not to satisfy a desire of its president to make a gift for personal reasons to a personal friend.[9]

Because "gratitude," standing alone, might involve a variety of different kinds of responses,[10] it is ap-

[9] That aspect of the problem is more directly involved in *Stanton*, where there was testimony of personal affection, and will be discussed there.

[10] For example, a lavish reward given by a parent to a passer-by who heroically rescued his child can be said to be motivated by "gratitude for services," yet it is evident that it involves a psychological response very different from Mohawk's "gratitude" for the commercially-valuable information given it by respondent. Rather than evoking simply the common sense of fairness that one ought to pay generously for value received, the danger to the child and the act of rescue strike upon deep-seated emotions of parental love and evoke a sharp emotional response having nothing to do with the commercial "value" of the services.

Another example might be the motivation involved in *Wright* v. *Commissioner*, 30 T.C. 392. There, Wright, a lawyer, and his personal friend, Fujii (a Japanese newspaper publisher), neither having a pecuniary interest at stake but both believing that the laws were discriminatory and unjust, successfully brought a test suit to have the California alien land laws declared unconstitutional. Thereafter, acting spontaneously, some 1100 persons of Japanese ancestry contributed to a fund out of which, at a dinner held in their honor, Wright and Fujii were each presented with $10,000 with appropriate commendations. The payment to Wright was held to be a gift rather than "compensation" for his legal services. As the Tax Court pointed out, the economic significance of the decision to most of the contributors was negligible, and it is evident that their response involved primarily emotions of national pride, vindication of their sense of social injustice, and admiration for the socially-motivated efforts of Fujii and Wright.

Although the Tax Court based its decision in *Wright* on the "intent" rationale, we submit that the distinguishing characteristic of cases of that sort is rather that the thing done by the payee acts upon the uniquely "personal" emotions of the payor and not simply upon the payor's sense of obligation to "reciprocate" for value received. In both kinds of cases, it is

propriate to state more precisely the nature of the corporation's "feeling" that, because the information was "so helpful" (i.e., commercially valuable), it "wanted" to make the payment. There is no evidence here that that "feeling" involved anything more than the ordinary desire—almost a sense of "obligation"—of one who has received an economic benefit from another to reciprocate in kind. The motive for the payment, that is, was simply what might be called "ordinary" gratitude for valuable services—a "gratitude" reflecting no more than the accepted ethic that it is "fair" or "right" or "proper" to give value for value, to share financial gains with those who have contributed to them, and to reward loyal service with more than the bare measure of recompense legally due. The motive here, in short, was no different from that that explains such commonplace "gratuities" as tips, employee bonuses, or "presents" to purchasing agents of customer companies.

2. On that analysis of the reasons for the payment, there can be little doubt that the payment here must be characterized as "compensation." If payments not legally due can be compensation—which is the basic premise of all the cases—then a payment motivated by ordinary gratitude for valuable commercial serv-

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true, the act done is the *sine qua non* of the payment, but it may be proper to view the intervention of at least some kinds of personal emotions as breaking the causal relationship between the act and the payment and precluding a characterization of the payment as "compensation." Whether such an exception should be made and, if so, what kinds of emotions should be given that effect need not, however, now be decided, for it is evident that no such personal emotions were involved here.

ices performed by the recipient must be compensation virtually by definition, for it is difficult to imagine any motive that provides a more direct causal relationship between the performance of the services and the receipt of the payment. Here, respondent gave Mohawk information at its request, and, when the information proved monetarily valuable, Mohawk out of due gratitude for the economic benefit it had received gave respondent the car. So far as the record appears, no personal emotion of any sort beyond the ordinary sense of gratitude for valuable services intervened in the chain of causation, and the transaction was as much an "exchange" as it is possible to have without an advance expectation of or agreement for payment.

CONCLUSION

For the reasons stated, the judgment of the court of appeals should be reversed.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.
CHARLES K. RICE,
Assistant Attorney General.
WAYNE G. BARNETT,
Assistant to the Solicitor General.
NORMAN H. WOLFE,
Attorney.

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BRIEF FOR RESPONDENT

IN THE

Supreme Court of the United States

October Term, 1959

No. 376

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

v.

MOSE DUBERSTEIN and SYLVIA DUBERSTEIN,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR THE RESPONDENTS

SIDNEY G. KUSWORM,
403 Keith Building,
Dayton, Ohio,
Counsel for Respondents.

Of Counsel:
JACOB A. MYERS,
403 Keith Building,
Dayton, Ohio.

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BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The memorandum findings of fact and opinion of the Tax Court (R. 26-29) are not officially reported. The opinion of the court of appeals (R. 30-34) is reported at 265 F. (2d) 28.

JURISDICTION

The judgment of the court of appeals was entered on April 8, 1959 (R. 29). On July 7, 1959, by order of Mr. Justice Brennan, the time within which to file a petition for a writ of certiorari was extended to and including Septem

ber 5, 1959 (R. 35). The petition was filed on September 4, 1959, and granted on December 14, 1959 (R. 35). The jurisdiction of this Court rests on 28 U. S. C. 1254(1).

QUESTION PRESENTED

The taxpayer, in 1951, upon request of a business friend of his, gave to the friend whose company did business with the taxpayer's company, some names of possible purchasers of items of merchandise which the business friend's company wanted to sell, which items were not handled by the taxpayer's company. The friend's company did not know what firm or firms handled the items of merchandise which it wanted to try to sell.

Taxpayer gave him the names of several companies who might be interested in purchasing the material, but he did not know, at the time, if any of the companies whose names he gave would want to buy any of the items inquired about. Taxpayer did not contact any of these firms for or on behalf of the business friend. Eventually the business friend of the taxpayer did some business with one or more of the firms or companies whose names were suggested by the taxpayer as possible purchasers of the product. The taxpayer does not know which, if any, of these firms or companies purchased the business friend's products or for how much. The business friend having sold merchandise and made a profit, insisted upon taxpayer accepting an automobile as a gift, which taxpayer reluctantly accepted because he already had two automobiles, and did not need a third one.

When the business friend found out from his company's auditor that the company would have to pay a tax on the automobile, he wanted to know from his company's auditor how it could avoid paying a tax and was told it could do so by charging the gift of the automobile off as a finder's fee.

This was done (*it was purely an afterthought*). In 1954, the taxpayer learned for the first time that the cost of the automobile had been deducted as a business expense by the donor, and the Government taxed the taxpayer for the value of the automobile.

The question is, under these circumstances, whether the car was income to the taxpayer or a "gift" excludible under § 22 (b) (3) of the Internal Revenue Code of 1939.

STATUTES INVOLVED

Internal Revenue Code of 1939 (26 U. S. C., 1952 ed.):

> Sec. 22. Gross Income.
>
> (a) General Definition.—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. . . .
>
> (b) Exclusions from Gross Income.—The following items shall not be included in gross income and shall be exempt from taxation under this chapter:
>
> • • • • • • •
>
> (3) Gifts, bequests, and devises.—The value of property acquired by gift, bequest, devise, or inheritance (but the income from such property shall be included in gross income);
>
> • • • • • • •

STATEMENT

Duberstein Iron and Metal Company is a corporation located in Dayton, Ohio. Mohawk Metal Company is a cor-

poration with its principal office in New York. Mose Duberstein, President of Duberstein Iron and Metal Company and Morris Berman, President of Mohawk Metal Company were personal friends. The corporations did business with each other over a period of years. Sometime in 1951 Berman called Duberstein and said that his company had some chemical and plastic products and wanted to know whether Mose Duberstein had any idea as to concerns who handle this type of products. Mose Duberstein gave him the names of some concerns that he thought might be interested in those kinds of products. This was done purely as a matter of friendship. Duberstein expected no monetary reward for telling his friend, Berman, the names of these concerns. Duberstein did not contact these concerns and Berman, at the time, evidently had no idea that he was beholden to Mose Duberstein for suggesting these names. Later on that year, Berman called Duberstein and informed him that he wanted to give Duberstein an automobile. Duberstein stated that he didn't want an automobile because he had two and besides, Berman or his company owed him absolutely nothing because he had done nothing for them except as a friend he gave the name of some firms who might be interested in the products Berman was asking about. However, Berman insisted that Duberstein take the automobile, which he did, and that is the last he, Duberstein, heard of the matter until in 1954, when an examiner for the Internal Revenue Department told Duberstein that he had to pay a tax on the automobile, the fair value of which the agent said was $4,250.00, which tax Duberstein refused to pay, and the matter finally went to the Tax Court by reason of a suit filed by the Taxpayers.

The Tax Court found that the car was income to Mr. Duberstein in the amount of $4,250.00 in the year 1951, and found the Petitioner liable for income tax thereon in the amount of $2,570.48 for the year 1951.

The United States Court of Appeals for the Sixth Circuit reversed the Tax Court, and held that the car was a gift.

SUMMARY OF ARGUMENT

I. Intent vs. Motive. Is this Court going to follow the intent of Congress and the Internal Revenue Code of 1939 which excludes gifts from gross income, or is it going to rewrite this section of the code by changing the definition of a "gift" and thereby encroach upon the powers of Congress (Art. I, Sec. I, U. S. Constitution)? A change in the definition of a word is a change in the word itself. If motive became the test for a gift, rather than intent, then there would no longer be an exclusion for a "gift" from gross income, but rather for something else. Any changes in exclusion from gross income in the Internal Revenue Code must be made by Congress and not indirectly by this Court by changing the definition of a word.

II. If motive were to become the test for a gift exclusion from gross income, what motives would be within the class of acceptable ones and which ones would be without the class? Revenue agents are not hired to be psychologists or psychiatrists, or possibly even phrenologists, but they may have to be in order to determine a person's motive.

The real problem comes with the greatest number of cases, meaning thereby from those who have mixed motives in giving a gift. A donor gives a gift to an employee's son—under the proposed motive test, will this be a tax free gift or not? Was the gift given because of the employment relationship or was it given because the donor just wanted to "give something for nothing." Who can tell a person what his motive was for making a gift?

Congress has given us the definition of a gift in the gift tax section of the code, and there is no reason why it should not do the same in the gift exclusion section from gross

income. If the Commissioner desires to change the law, he should go to the Congress and not to the courts.

I. Whether a Payment Is a "Gift" for Federal Income Tax Purposes Depends upon the Intent of the Donor.

When Congress used the word "gift" in Section 22 (b) (3) of the Internal Revenue Code of 1939, it had a well settled judicial meaning, uniform for over a hundred years; in fact this section was enacted in 1913 and has been re-enacted fifteen times without change to date. Congress is presumed to have used it in this settled judicial meaning. *United States* v. *Merriam*, 263 U. S. 179.

In taxing statutes, the literal meaning of words employed is most important, for such statutes are not to be extended by implication beyond the clear import of the language used. If words are doubtful, the doubt must be resolved against the government and in favor of the taxpayer. *United States* v. *Merriam* and *United States* v. *Anderson*, (1923) 263 U. S. 179, affirming Id. C. C. A., 2nd, 1923; 282 Fed. 851. The judicial definition of "gift" is the same as that given by Blackstone and Kent and the dictionary. It is:

> "A voluntary transfer of property by one to another, without any consideration or compensation therefor."

In using the word "gift" Congress meant to employ it in the ordinary and well settled meaning of the term. *Woolford Realty Co.* v. *Rose*, 286 U. S. 319, 327; *Old Colony Railroad Co.* v. *Commissioner*, 284 U. S. 552, 560. And where a word has an established judicial meaning, as "gift" has, Congress is presumed to have used it, in that meaning.

The same section of the Statute, which excludes gifts from income, also excludes legacies from income.

In *United States* v. *Merriam*, 263 U. S. 179, the court stated at page 187:

"The word 'bequest' having the judicially settled meaning which we have stated, we must presume it was used in that sense by Congress." *Kepner* v. *United States*, 195 U. S. 100, 124; *The Abbotsford*, 98 U. S. 440.

The same reasoning applies to the word "gift" since both it and "bequest" were included in the same section of the Code at the same time, and they both refer to exclusions from income.

In order that a gift may be made, there must be a donative intent on the part of the donor, a transfer of the property, and receipt of the property by the donee. If one of these elements is lacking, then there is no gift, but rather a trust, a loan, a payment, or a bailment.

The Commissioner is contending that even if all the Common Law elements of a gift are present, there cannot be a gift if the donor has the wrong kind of motive.

This Court is called upon to determine the way Congress intended the word "gift" to be interpreted, and in doing so, the elements therein contained. One insight will be gotten from a Ways and Means Committee of the House of Representatives Report. This particular Committee was discussing the word "gift" as used in the gift tax, but the content is still valuable in this particular context.

"The tax applies only to gifts made by individuals, and so far as the calendar year 1932 is concerned, appiles only to gifts made after the enactment of the Act (section 532 [a]).

The terms 'property,' 'transfer,' 'gift,' and 'indirectly' are used in the broadest and most comprehensive sense; the term 'property' reaching every species of right or interest protected by law and having an exchangeable value.

The words 'transfer . . . by gift' and 'whether . . . direct or indirect' are designed to cover and comprehend all transactions (subject to certain express conditions and limitations) whereby, and to the extent

(section 503) that, property or a property right *is donatively passed* (emphasis ours) to or conferred upon another, regardless of the means or the device employed in its accomplishment. For example, (1) a transfer of property by a corporation without a consideration, or one less than adequate and full in money or money's worth, to B would constitute a gift from the stockholders of the corporation to B; (2) a transfer by A to a corporation owned by his children would constitute a gift to the children; . . . (H. Rep. No. 708, 72d Cong., 1st Sess. CB 1939-1 Part 2, 457, 476.")

Congress was then only concerned with donative intent and not with the motive behind the intent.

It is clear that the true intention of the parties should control in determining whether the payment involved is in fact a gift or compensation. A donative intent is an essential requirement of a gift. Bogardus v. *Commissioner*, 302 U. S. 34; *Helvering* v. *National Grocery Co.*, 304 U. S. 282; *Botchford* v. *Commissioner*, 9 Cir., 81 F. (2d) 914; *Mulqueen* v. *Commissioner*, 2 Cir., 65 F. (2d) 365. If the payor's intent is not shown, the recipient's belief or his treatment of the payment is immaterial. *Arthur L. Lougee*, 26 B. T. A. 23, affd. 63 F. (2d) 112 (C. C. A. 1st, 1933).

A legal obligation of the payor is not necessary to constitute the payment as income to the recipient, but this rule has only been applied where (1) there was an employment relationship between the donor and the donee, or (2) where there was no intent to make a gift. [*Old Colony Trust Co.* v. *Commissioner*, *supra*; *Edward F. Webber*, 21 T. C. 742 (1954), affd. 219 F. (2d) 834 (C. C. A. 10th, 1955).]

In *Edward F. Webber*, *supra*, the taxpayer was a preacher who preached and solicited contributions from listeners over the radio. The court held, "The determination of the taxable nature of monies received depends largely upon the real intent of the parties, particularly the

payor, as disclosed by the particular facts and circumstances surrounding the questioned payments. *Bogardus* v. *Commissioner*, 302 U. S. 34; *Helvering* v. *National Grocery Co.*, 304 U. S. 282, 289; *Commissioner* v. *Jacobson*, 336 U. S. 28; *Fisher* v. *Commissioner*, 2 Cir., 59 F. 2d 192; *Bass* v. *Hawley*, 5 Cir., 62 F. 2d 721; *Willkie* v. *Commissioner*, 6 Cir., 127 F. 2d 953; *Thomas* v. *Commissioner*, 5 Cir., 35 F. 2d 378; *Smith* v. *Manning*, 3 Cir., 189 F. 2d 345. In absence of an expressed donative intent of the payor, the tax court may draw reasonable basis for its conclusion that the payments were compensatory rather than donative, we have no alternative but to affirm its decision, *Botchford* v. *Commissioner*, 9 Cir., 81 F. 2d 914, *Poorman* v. *Commissioner*, 9 Cir., 131 F. 2d 946."

This case falls into the pattern of cases which require that donative intent be shown by the taxpayer before there can be a gift. An exception to this rule is found in the case of *Helvering* v. *American Dental Company*, 318 U. S. 322, where no donative intent was shown and still a gift was found to have been made.

In the *Old Colony Trust Company* v. *Commissioner*, 279 U. S. 716, the Board of Directors of the corporation by which the taxpayer was employed, voted to pay the taxes on the taxpayer's salary as a "gift" to him. The Court stated, "The taxes were paid upon a valuable consideration, namely, the services rendered by the employee and as part of the compensation therefor. We think therefore, that the payment constituted income to the employee."

In the above case (*Old Colony Trust Co.* v. *Commissioner*) there was no gift, even though there was a donative intent shown, because there was an overriding factor, that factor being that there was an employment relationship which created almost an irrebutable presumption of compensation rather than gift. *Willkie* v. *Commissioner*, 127 F. (2d) 953 (C. C. A. 6th, 1942); *Poorman* v. *Commis-*

sioner, 131 F. (2d) 946 (C. C. A. 9th, 1942); *Carragan* v. *Commissioner*, 197 F. (2d) 246 (C. A. 2d, 1952); *Nickelsburg* v. *Commissioner*, 154 F. (2d) 70 (C. C. A. 2d, 1946); *Wallace* v. *Commissioner*, 219 F. (2d) 855 (C. A. 5th, 1955); *Commissioner* v. *LoBue*, 351 U. S. 243.

There is no such presumption in the case at bar, as there was neither an employer-employee relationship nor any type of commission arrangement between Duberstein, as donee, and Berman, as donor of the gift. The relationship between these parties was purely a friendly one, which had grown up over the years from doing business together. This was not a payment as the one made in *LoBue*, *supra*, which was "prompted by the employer's desire to get better work from him."

In *Commissioner* v. *LoBue*, *supra*, the donee was given stock options in recognition of his "contribution and efforts in making the operation of the company successful." This Court held that this was not a gift but clearly compensation for services rendered, since this is what the resolution of the donor stated.

If the test is properly one of intent and if the determination of that question is one of fact, the decision of the Court of Appeals involving this issue should not be disturbed by this Court. The reason for the reversal of the Tax Court by the Court of Appeals in *Duberstein* v. *Commissioner*, was because the weight of the evidence presented in the Tax Court was in favor of the taxpayer and not in favor of the Commissioner, as the Tax Court so held.

The evidence presented in the Tax Court clearly showed that there was an intent to give the car to Duberstein as a gift. Mr. Duberstein's uncontradicted testimony stated in part:

> ". . . And he said, well, he had a cadillac car as a gift, and I should send to New York to receive it, which I finally did." (R. 14)

This statement shows that Berman clearly intended that Duberstein receive the automobile as a gift, *which fact the Commissioner has conceded.*

The cases which have been decided concerning the question of "What is a gift" can be reconciled, and the case at bar will stand under this reconciliation as a case of a gift and not one of compensation. In *Bogardus* v. *Commissioner*, 302 U. S. 34, a "bouns" or "honorarium," as the donor there called it, was given by a corporation, called "Unopco," which had the same shareholders as the Universal Oil Products Company, which had been the employer of the donee. The shareholders of "Universal" had sold all their shares to another corporation, United Gasoline Company, reserving only $4,000,000 for "Unopco," a corporation whose "only business was the investment and management of the assets thus required." "Unopco" made a general distribution as a "gift" or "honorarium" of $6,000,000 to all the former employees of "Universal," of which the plaintiff's share was $10,000. Although the shareholders of "Unopco" had been the same as those of "Universal," the donees were not continued as employees of "Unopco," but remained in the employ of "Universal."

The Supreme Court of the United States held that the payments made to the employees of Universal were gifts and not compensation. This Court stated, "Whether the receipts are gifts, is primarily a question of fact to be resolved upon the circumstances of the cases." *Bogardus* v. *Commissioner*, *supra*; *Commissioner* v. *Jacobson*, 336 U. S. 28.

In *Bogardus* v. *Commissioner*, *supra*, the facts showed: (1) a clear donative intent, (2) the employees who received the gifts were no longer employees of the donor, (3) any services which were previously performed were fully compensated for.

Duberstein a present. He stated that he had a Cadillac car for Duberstein and requested him to come to New York to receive it as a gift. At that time, Duberstein advised Berman that he did not feel Berman or the company owed him anything, that he had not expected anything for the information given to Berman, and had not intended to be compensated. He testified that Berman insisted he accept the Cadillac car. Duberstein did so. No further conversations were had between Duberstein and Berman, after receipt of the car, concerning the question of whether it was a gift or was taxable compensation. It was undisputed that Duberstein was not an employee of the Mohawk Metal Corporation and that there was no understanding or agreement between him and Mohawk Metal Corporation that he was to be compensated in any way for information given Berman.

In 1954, an agent of the Internal Revenue Department got in touch with Duberstein and stated his intention to charge Duberstein with receipt of income in 1951 in the amount of the fair market value of the Cadillac. Duberstein referred the matter to his accountant, one Flagel, who then learned that Mohawk Metal Corporation had deducted as expense the value of the Cadillac car on its tax return for 1951, classifying the item as a "finder's fee" paid to Duberstein. Mr. Flagel wrote several letters to Berman concerning the matter, but got no response. He then contacted one Gorin, the accountant who prepared the income tax return for Mohawk Metal Corporation. Evidence was received by the Tax Court that when Gorin, Mohawk's accountant, prepared the 1951 tax return for the corporation, he discussed the matter of this Cadillac automobile with Berman. He gave Flagel the following account of his talk with Berman:

> "Well, he had talked with Mr. Berman and explained to Mr. Berman that if the Cadillac was recorded as a gift, it would not be deductible as such. Mr. Berman wanted to know how it would be deductible."

The Tax Court concluded as follows:

> "Upon this record, we conclude that petitioners have failed to carry the burden of proving that the automobile was a gift. The only justifiable inference is that the automobile was intended by the payor to be remuneration for services rendered to it by Duberstein."

It bottomed its decision primarily upon its finding that, "the record is significantly barren of evidence revealing any intention on the part of the payor to make a gift."

We believe that the taxpayer met his burden of proof and that any presumption in favor of the correctness of the Commissioner's assessment disappeared when met by uncontradicted evidence that the Cadillac automobile was a gift. The Tax Court was of the opinion that there was no evidence introduced by taxpayer as to the donor's donative intent. In this, we think the Tax Court disregarded the effect of the uncontradicted testimony. It was not necessary to bring in the donor, himself, to prove his donative intent. The taxpayer's uncontradicted evidence gave an account of what was said and done at the time the event occurred. The intent that then prevailed should control the character of the transfer. Duberstein testified as follows:

> "He (Mr. Berman) told me that due to the fact that I—information that I had given him was so helpful, that he felt that he wanted to give me a present. I told him he didn't owe me anything. And he said, well, he had a Cadillac car as a gift, and I should send to New York to receive it, which I finally did. But I told him he owed me nothing, and I didn't expect anything for the information, and I didn't intend to be compensated, but he insisted and I accepted this Cadillac car."

The foregoing is clear and distinct evidence of the donative intent of Berman at the time that arrange-

ments were made to deliver the Cadillac car. This evidence was not impeached, and we think the Tax Court was in error in its assertion that the record was barren of any proof of donative intent. The Tax Court inferred lack of donative intent on the part of Berman because his corporation took the value of the car as a business expense, classifying it as a "finder's fee." If, in fact, there was donative intent at the time of the event involved, a subsequent change of mind by the donor at income tax time, cannot change the character of what was, in fact, a gift at the time it was made. The evidence received as to the conversation between the accountants for Duberstein and for Mohawk Metal Corporation cleary indicates that treating what had been a gift as a business deduction was either an afterthought or a change of mind on the part of Berman.

> "He . . . explained to Mr. Berman that if the Cadillac was recorded as a gift it would not be deductible as such. Mr. Berman wanted to know how it would be deductible."

The foregoing strongly indicates that even at the time of the discussion with his accountant, Mr. Berman was talking about this Cadillac as a gift. The fact that a decision may then have been made to label it as a "finder's fee" and claim it as a deduction, does not change the original character of the transaction. The Government offered no evidence to contradict Duberstein.

The appropriate rule has been stated by this Court in an Opinion by Judge Denison in the case of *Rookwood Pottery Co.* v. *Commissioner of Internal Revenue*, 45 F. (2d) 43 (45):

> "We see no reason why the taxpayer did not make its case when it put in proofs clearly and distinctly tending to show this value; and when the proofs so introduced remained unchallenged by contrary proofs or by destructive analysis, it was the duty of the Commissioner to decide the issue in accordance with the proof then appearing before him; and it was, we think, the duty of the board to take the same view."

In the case of *Lunsford* v. *Commissioner of Internal Revenue*, 62 F. (2d) 740 (742), this Court reaffirmed this principle in a case very much in point with the case at bar. There the question was whether or not a payment was a gift or compensation. Speaking for this Court, Judge Simons said:

> "We have repeatedly held that the taxpayer has made out his case when he has put in proofs 'clearly and distinctly tending to show' a determinating fact. . . . The presumption that the Commissioner is right is procedural and cannot survive such proofs unless they are challenged by contrary proofs, or destructive analysis, and we have gone so far as to say that the taxpayer's affirmative evidence may itself contain the necessary challenge and furnish the material for such analysis."

We find that the taxpayer's evidence clearly and distinctly offered proof that the Cadillac car was, in fact, a gift. It was not challenged by contrary proofs or destructive analysis.

It may be contended that in such a case as this we should add suspicion to presumption of correctness to aid the Commissioner's assessment of a deficiency. This we can not do. These matters should be decided on evidence. In the case of *Lunsford* v. *Commissioner*, supra, Judge Simons characterized such attitude as follows:

> "At most, the Board's finding rests upon mere suspicion, upon an inference that generosity of the kind here involved is so rare that it must necessarily from that fact alone be suspected."

We hold that the taxpayer met his burden of proof that the Cadillac was a gift, and the decision of the Tax Court is, accordingly, reversed.

MARTIN, Chief Judge, dissenting. As I view this case, there was ample circumstantial evidence to sup-

port the Commissioner of Internal Revenue and the Tax Court in finding that the appellant received the Cadillac automobile, not as a gift, but for the valuable consideration of services rendered. I am, therefore, unable to concur in the majority opinion.

The United States Court of Appeals for the Sixth Circuit in its opinion, showed ample reason for its decision. On the question of whether or not the deduction by the donor was either an after-thought or a change of mind, we respectfully call this Court's attention to the words in the opinion of the United States Court of Appeals for the Sixth Circuit, as follows:

> *"The evidence received as to the conversation between the accountants for Duberstein and for Mohawk Metal Corporation clearly indicates that treating what had been a gift as a business deduction was either an afterthought or a change of mind on the part of Berman.*
>
> > *" 'He . . . explained to Mr. Berman that if the Cadillac was recorded as a gift it would not be deductible as such. Mr. Berman wanted to know how it would be deductible.'*
>
> *"The foregoing strongly indicates that even at the time of the discussion with his accountant, Mr. Berman was talking about this Cadillac as a gift. The fact that a decision may then have been made to label it as a 'finder's fee' and claim it as a deduction, does not change the original character of the transaction. The Government offered no evidence to contradict Duberstein."* (Emphasis ours.)

The taxpayer never received a Form 1099 and Mohawk's accountant stated that he had receipts for every 1099 he sent out but he did not have a receipt showing he sent one to Duberstein.

In *Whitney* v. *Commissioner* (C. A. 3rd, 1934), 73 F. (2d) 589, the Court states that once the taxpayer meets the

burden of proof "The burden shifted and the government was required to come forward with evidence to refute the evidence of the taxpayer. It did not do so and the Board cannot draw inferences and conclusions from facts or suppositions outside the record."

In *Crude Oil Corp. of America* v. *Commissioner* (C. A. 10th, 1947), 161 F. (2d) 809, it was held *"The presumption of the correctness of the Commissioner's finding is one of law. It is not an inference of fact. It disappears when evidence, sufficient to sustain a contrary finding, has been introduced."* (Emphasis ours.)

The cases of *Gillette's Estate* v. *Commissioner* (C. A. 9th, 1950), 182 F. (2d) 1010, and *Hemphill Schools, Inc.* v. *Commissioner* (C. A. 9th, 1943), 137 F. (2d) 961, held *that the presumption that the determination of the Collector of Internal Revenue is correct does not serve as evidence.*

In the case of *A & A Tool and Supply Co.* v. *Commissioner* (C. A. 10th, 1950), 182 F. (2d) 300, it was held *that the Tax Court may not arbitrarily discredit and disregard unimpeached, competent and relevant testimony of a taxpayer which is uncontradicted. In that case it was held that the taxpayer's opinion as owner as to the rental value of real estate which was in evidence was sufficient to overcome the presumption of the correctness of the determination of the Collector of Internal Revenue with respect to the same question, there being no other evidence on the point in the record.*

The law with respect to the effect of the Commissioner's determination is set forth in the case of Joseph Starr at page 293, Tax Court Memorandum Decisions, Vol. 13 as follows: "The rule as to the burden of proof upon the petitioner is generally stated to be that the taxpayer having the burden of proof must prove his facts by a 'preponderance of the evidence' and by competent evidence." . . . The Commissioners determination is prima facie correct. Of

course, that presumption does not amount to substantive evidence."

In *Wichita Terminal Elevator Co.*, 1946, 6 T. C. 1158, Aff'd (C. C. A. 10th, 1947), 162 F. (2d) 513, 35 A. F. T. R. 1487, the taxpayer relied only on the formal documents of sale and did not appear personally to testify with respect to when a sale of corporate assets was negotiated. There was no other testimony and the Court in effect relied on the "one-step" rule in deciding against the taxpayer. The Court said at page 1165, Vol. 6 Tax Court Reports, "The rule is well established that the failure of a party to introduce evidence *within his possession* (emphasis ours) and which, if true, would be favorable to him, gives rise to the presumption that if produced it would be unfavorable."

As the record demonstrates, there was no contract of employment or arrangement of any kind between Mohawk Metal Corporation and Mr. Duberstein. Mohawk was not obligated to Duberstein in any way and there was no intention to compensate Duberstein in any way at the time the gift of the car was made. It was purely out of friendship that the car was given to Duberstein. Duberstein rendered no service to Mohawk and his services were not solicited by Mohawk Corporation. It was purely and simply a matter of friendship that he dicsussed Mr. Berman's problems with him.

In view of Mr. Duberstein's testimony, which was not contradicted, it was clearly erroneous for the Tax Court to find that the car constituted income to Mr. Duberstein.

The case of *Alice M. MacFarlane* v. *Commissioner*, 19 T. C. 9, held a payment made by a corporation to be a tax free gift to the recipient despite the fact that the payment was deducted by the corporation.

In John McKeon, 39 BTA 813, a payment of $20,000.00 which was deducted by the donor made to the taxpayer for

his services in assisting in the sale of certain securities was held to be a non-taxable gift to the recipient, since there was no agreement for compensation, or legal liability to pay. This case differs in no substantial particular from the case at bar. There are the smiliarities of no existing agreement for compensation and no legal liability to pay, plus the additional reluctance and initial refusal of the donee to accept the gift, followed by the later acceptance of the gift, at the insistence of the donor.

We call attention to the case of *Lunsford* v. *Commissioner* (C. C. A. 6, 1933) 62 Fed. (2d) 740, which holds a $50,000.00 gift non-taxable where there was no employer-employee relationship, and in which there was no evidence of shareholder approval of the gift in the record. The Circuit Court says, in reversing the Tax Board, "At most, the Board's finding rests on mere suspicion, upon an inference that generosity of the kind here involved is so rare that it must necessarily from the fact alone be suspected."

We respectfully submit that the decision of the Tax Court in this case was based on an analogous type of suspicion, and not from testimony in the record.

The United States Court of Appeals for the Sixth Circuit had every legal right to reverse the Tax Court. The reasons given by the distinguished Solicitor General of the United States for granting the Writ as not tenable here, because the case at bar and the cases cited are easily distinguishable. We do not feel that any argument is necessary to distinguish them because they speak for themselves. There was no relationship in the case at bar with the taxpayer as employer, employee, stockholder or otherwise, and this fact distinguishes the cited cases from the case at bar.

CONCLUSION

The petition for a writ of certiorari should therefore be denied.

Respectfully submitted,

SIDNEY G. KUSWORM,
403 Keith Building,
Dayton 2, Ohio,
Attorney for Appellants.

October, 1959

BRIEF FOR PETITIONER

FILE COPY

No. 376

In the Supreme Court of the United States

OCTOBER TERM, 1959

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

MOSE DUBERSTEIN AND SYLVIA DUBERSTEIN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE PETITIONER

J. LEE RANKIN,
Solicitor General,
CHARLES K. RICE,
Assistant Attorney General,
WAYNE G. BARNETT,
Assistant to the Solicitor General,
NORMAN H. WOLFE,
Attorney,
Department of Justice, Washington 25, D.C.

The distinction between the *Old Colony Trust Company* case, *supra*, and the *Bogardus* case, *supra*, is that in both cases there was the intention to make a gift on the part of the donor but in the *Old Colony Trust Company* case, the services being rendered were by an employee, and were found to be a consideration, in that the employee was *still* an employee and this gift was merely an attempt by the employer to increase his salary, tax free.

In *Estate of Grace G. McAdow*, 12 T. C. 211 (1949), the son and daughter of the taxpayer's former employer transferred to the taxpayer securities of substantial value, describing the transfer as a gift and filing gift tax returns. The taxpayer had been fully compensated for his employment, and services which he had rendered to the son and daughter were mainly incidental to his employment by the father. The motive of the gift was recited by the son and daughter to be "for an old and true friendship of over 20 years." Under these circumstances it was held that the transfer was a gift, and not compensation for additional services. The Commissioner of Internal Revenue acquiesced to this determination.

The same reasoning was used in *Smith* v. *Manning*, 189 F. (2d) 345 (C. A. 3d, 1951), with the result again turning on "intent." In this case the taxpayers were employed by their father. The Internal Revenue Department disallowed part of the salaries paid to the children as business expenses because they were excessive. The taxpayers then brought suit for a refund of the tax paid on the disallowed portion of their salaries claiming that they were gifts. The Court held for the government, because even though the payments were not deductible as compensation, because they were excessive, they were also not gifts because there was no donative intent shown. The court here used mutually exclusive tests for "compensation" and "gifts."

In all the aforementioned cases, the basic factor necessary to find a gift was that there be an intent to make a gift. The reasons the donor might have had for giving the gift were more or less irrelevant.

The only exception to this rule has been where the donor has also been the employer of the donee. In these cases the courts have held that the intent to give a gift was merely an ostensible intent and that actually the gift was a further payment for services performed or to be performed by the donee.

The leading cases on this point are the *Old Colony Trust Company* case, *supra*, and the *LoBue* case, *supra*. This rule applies to the type of situation where a Christmas gift, a production bonus, or some other type of gift is given to an employee. Because of the tie-in of extra payments to employees by employers, to their regular work and salary, there is a presumption of compensation where such "gifts" are given. To merely show, in these cases, where there is an employment relationship, that the donor "intended" to give a gift is not enough, because this alone will not rebutt the presumption of compensation which exists because of the employment relationship. The Courts in these cases have demanded that there be a showing, where such an employment relationship exists, that the gift was not for further payment of services rendered, but rather for some other reason which is apart and detached from this employment relationship. This is why the court in *LoBue*, *supra*, demanded a "detached and disinterested generosity" for giving the gift before it would find that a gift had been made. It had to be sure that the gift was a gift and not further compensation. There is no such presumption existing except where the donor is also the employer, and the donee, the employee. Where there is no employment relationship, a showing of "intent" alone is sufficient to sustain the holding of a "gift."

II. Motive Cannot Be Used to Determine If a Gift Has Been Made for Federal Income Tax Purposes.

The Commissioner's argument that "motive" rather than "intent" should be used to determine if a gift has been made is an attempt by him to have this Court assume a legislative function. The reason he wants "motive" to be used as the test, is because he desires to have a loophole closed which exists in the law, but this closing is a proper legislative and not a judicial function. The loophole is that certain gifts are proper business expenses to the donor and are deductible as such, and they are also excludable from income by the donees as gifts. The government is losing tax dollars on transactions such as these and wishes this Court to legislate in the field, by saying that the definition of gifts for donor and the donee are the same.

An example of such a situation would be where A is a retailer and B is a salesman who has never sold to A, but desires to have his business. In order to lay a foundation for his approach of A for his business, B gives to A, a set of golf clubs as a gift. B then approaches A, but is refused his business. B may deduct these golf clubs as a business expense, probably for good will or advertising. A on the other hand has a pure and simple gift as the law now reads. There was a donative intent on the part of B and A has had no connection with B, except that B has solicited his business. B has performed no services for A, nor is he employed by him.

If the motive approach were used as the Commissioner has proposed, B would have a deduction as an expense as he did before, but A would have to pay a tax on the gift because B's motive in giving the gift was to increase his business. For the sake of argument, this is assuming that there cannot be a business motive and have a valid gift, *infra*. This would mean that if the donor would use the "gift" as a deduction, then the donee could not receive the

item as a "gift," but rather it would have to be compensation. He would be bound by the donor's treatment of the item, either as an item of expense or as a gift.

The flaw in the government's argument is that the converse situation will not follow the rule which it has proposed. In this situation, A may perform some service to B. B will pay A for the service which was performed, but B's payment to A is held to be a gift under the gift tax law because he has not received an adequate and full consideration in money or money's worth under the test provided in the gift tax section. Since A has performed the service and been paid for it, the payment which he received is taxable as income. Here the payor had a business motive and he has still been held to have made a gift.

A, who has received the payment, cannot claim that he has received a gift because the donor-payor is held to have made a gift. The treatment of the item by B does not govern the treatment of the item by A, but the Commissioner desires this result when the payor uses the item as an expense item.

In the famous *Pot of Gold* case [Pauline C. Washburn, 5 T. C. 1333 (1945); Accord: *Bates* v. *Glenn*, 114 F. Supp. 445 (W. D. Va. 1953), affd., 217 F. (2d) 535 (6th Cir. 1954), § 74, 1954 Code], it was held that a prize given away on a radio show was a gift as far as the recipient of the prize was concerned and was not taxable to her as income, since she performed no services and gave no other consideration for the award. It would seem fairly obvious, however, that the sponsor of the program did not make a taxable gift to the prize winner, since from the sponsor's point of view of this was a business expense, i.e., part of the cost of the radio program. Under the 1954 Code commercial prizes and awards, like the Pot of Gold, are now taxable as income [§ 74, 1954 Code. Cf. *Christian H. Droge*, 35 B. T. A. 829 (1937); *Max Silver*, 42 B. T. A. 461 (1940); I. T. 1651, II-1

C. B. 54 (1923); T. 1667, II-1 C. B. 83 (1923); I. T. 3987, 1950-1, C. B. 9].

Congress realizing there was a loophole in the law, closed it with new section 74 of the Internal Revenue Code. By its action, Congress has shown that remedying this type of a situation is a legislative function and not a judicial one. The Pot of Gold situation is almost identical to the one at bar. If Congress desired to have a "gift" turn on the motive of the donor, it would have amended this section of the Code, the same as it enacted section 74 of the Code.

The determination of a donor's motive in most instances, would be much more difficult to determine than his intent. The courts have required an outward manifestation of intent, but in what way can a person show his motive? Must he say "I have intent to give a gift, and this is the reason I have such an intent?" There is no where shown that Congress intended that gifts could be given only for certain reasons and not for others. For example, if one man hated another so much that he decided to give him $100,000, knowing that he would drink himself to death, there would nevertheless be a gift. There was an intent to make a gift and the motive would be one of hate. The same $100,000 gift could be made by one friend to another and the motive would be for love or friendship.

In each of these two situations a gift was made. In the first case the motive was hate, and in the second it was for love and/or friendship.

The Commissioner is contending that a gift may be given only for "affection, respect, admiration, charity, or like impulses" (*Robertson* v. *United States*, 343 U. S. 711, 713-714) or for "detached and disinterested generosity" (*Commissioner* v. *LoBue*, 351 U. S. 243). In *Commissioner* v. *Jacobson*, 336 U. S. 28 at page 50 there is a more logical and meaningful definition of a gift when it states, "It is conceivable, although hardly likely, that a bondholder, in

the ordinary course of business and without any express release of his debtor, might have sold part of his claims on the bonds he held at the full face value of those parts and then have made a gift of the rest of his claims on those bonds to the same debtor *for nothing*" (emphasis ours).

This test more adequately describes the cases which have been decided by this and the lower courts on the question of "has a 'gift' been made?" A gift is a transfer of something of value "for nothing." This means that it is irrelevant what the reasons may be for giving the gift; they may be for business [*Old Colony Trust Company* v. *Commissioner, supra; Bounds* v. *United States*, 262 F. (2d) 876 (C. A. 4th, 1958)], as well as for any other reason and therefore not fit under the *Robertson* or the *LoBue* definitions, but rather under the *Jacobson* definition of a gift.

In *Bounds* v. *United States, supra*, the court very adequately summed up the relationship which exists between a donor and a donee when it said, "Rarely is a gift bestowed upon a complete stranger who has never had even an indirect relation to the donor or to someone related to the donor." In all of these "widow's bonus" cases, the relationship between the widows and the donor-corporation was one created through a business relationship of their husbands with the corporation. The payments to the widows were held to be gifts because there was a transfer "of something (the bonus) for nothing." It makes no difference why the gift was given as long as it was given for nothing.

The Treasury ruled at one time that payments by an employer to the widow of a deceased employee could be deducted by the employer as business expenses, although they were treated as a gift as far as the widow was concerned. [I. T. 3329, 1939-2, C. B. 153. Revoked in I. T. 4027, 1950-2 C. B. 9. Cf. § 101 (b), 1954 Code; *Bausch* v. *Commr.*, 186 F. (2d) 313 (C. A. 2d, 1951).]

The case at bar is also a transfer of something for nothing and it is irrelevant that there was a business relationship between the parties and that there might have been a business motive for making the gift. This reason only affects the donor. The uncontradicted testimony of Duberstein shows that there was an intent to make a gift, which fact as above stated, the Commissioner has conceded.

Duberstein testified as follows:

> "He (Morris Berman) told me that due to the fact that I—the information that I had given him was so helpful, that he felt that he wanted to give me a present. And I told him he didn't owe me anything. And he said, well, he had a Cadillac car as a gift, and I should send to New York to receive it, which I finally did, but I told him he owed me nothing, and I didn't expect anything for the information, and I didn't intend to be compensated but he insisted that I accept this Cadillac car." (R. 14)

Duberstein and Mohawk (Berman) dealt in buying and selling copper and various other metals (R. 13). The testimony then stated:

> "Q. Now, state whether or not it is a fact that occasionally when you talked to him he would ask you questions about the names of consumers who used certain chemicals, and that if you knew the names of such consumers you'd give them to him? A. That's right. I did.
>
> Q. What were the type of materials, or chemicals that he asked you about? A. Oh, one was plexiglas, and another was polyethylene, nickel salts." (R. 14)

Duberstein was asked by Berman if he knew who were consumers of certain chemicals which Berman desired to sell and *which chemicals Duberstein did not deal in. Duberstein was not asked if he knew who would purchase the chemicals, but rather if he knew who were consumers of the*

chemicals, or in other words, companies which might be interested in purchasing these chemicals. Duberstein then gave to Berman the names of companies which might be interested, and not names of companies which would be interested in making such purchases.

The Commissioner is contending that Berman (Mohawk) gave the gift to Duberstein because Duberstein had given him commercially valuable information. There is great doubt as to the value of the information which was given, although concededly everything is of some value to someone. There is a great distinction between telling who *will* purchase the products and who *might possibly* be interested in purchasing the product. Duberstein in no way performed any service, as the Government claims, but instead he gave to Berman some information so that *Berman* might be able to perform the service; that service being, the finding of a buyer for Berman's products. *If, on the other hand, Duberstein had himself made inquiries as to who would be interested in purchasing the materials, which Berman had to sell, Duberstein would have performed a service and any payment made to him would have been in the form of compensation. Duberstein did not give to Berman the name of a person who would purchase Berman's products, but rather gave to him the names of individuals who might possibly be interested in purchasing his products.*

Mohawk (Berman) gave to Duberstein a Cadillac worth $4,250.00 (R. 8) because he was grateful to Duberstein for having told him who *might* be interested in purchasing his products. What was the value of this information, if it had any? Duberstein could have been reading the names of concerns out of a trade journal. *The Court of Appeals opinion describes Berman's "motive" well when it states,*

> *"The evidence received as to the conversation between the accountants for Duberstein and for Mohawk Metal Corporation clearly indicates that treating what*

had been a gift as a business deduction was either an afterthought or a change of mind on the part of Berman.

> *'He . . . explained to Mr. Berman that if the Cadillac was recorded as a gift it would not be deductible as such. Mr. Berman wanted to know how it would be deductible.'*

The foregoing strongly indicates that even at the time of the discussion with his accountant, Mr. Berman was talking about this Cadillac as a gift. The fact that a decision may then have been made to lable it as a 'finder's fee' and claim it as a deduction, does not change the original character of the transaction. The Government offered no evidence to contradict Duberstein." (R. 34 & 35)

Berman wanted to deduct this "gift" as an expense, so he labeled it as a "finder's fee." Duberstein found nothing but rather Berman did all the finding in this case. The answer is that Berman was grateful; whether he had anything to be grateful about or not, the Commissioner does not seem to be concerned with at this time. The only claim is that an automobile was given because of gratitude. There was no payment for services rendered here because there was no service involved, but still there was gratitude.

The Commissioner therefore is contending that Berman could have been grateful to anyone except a business friend and he could have given anyone else a Cadillac as a gift. The same kind of "gratitude" is no good when the gift is deducted as a business expense by the donor. The Commissioner's view on this point is rather one sided.

If this automobile had been checked closer as a deduction on Mohawk's tax return, it most likely would not have been allowed in the first instance. There was no consideration which passed for the car and therefore it should have been treated as a gift. Since the Commissioner has let the stat-

ute of limitations run against Mohawk, the only one from whom it can recoup its loss is Duberstein.

The distinction as to who may be grateful and for what reasons is too fine of a distinction for anyone to comprehend and enforce. If one person for gratitude may give a gift, then another for the same feeling of gratitude must be able to give a gift. In order to be grateful, there must have been something done by someone. This is inherent in the word "gratitude." The same feeling (gratitude) may elicit different or similar responses from different people, for the same act performed. Are we going to say that dependent upon the response and the *motive behind the motive of gratitude* of the donor, we will try to determine if there has been a valid gift or not? Not even Congress would enact a law with such potential complications as this.

It is common knowledge that a great proportion of the gifts given arise out of business relationships. Are we going to call all of these gifts income to the donee because of the fortuity of a business relationship? If this be the rule then consider all the brides who will have a taxable income in the form of gifts from their fathers' business associates; or the little boy who receives a toy gun for Christmas from his father's employer, and has to fill out an income tax form to report this as income. This is not the result which we desire to reach.

To reach the conclusion that gifts cannot be made, except where there is love and affection between the parties would cause this Court to overrule a whole line of cases, where the basis of the relationship between the parties was a business one. *Bogardus* v. *Commissioner*, 302 U. S. 34; *Helvering* v. *American Dental Company*, 318 U. S. 22; *Bounds* v. *United States*, 262 F. (2d) 876 (C. A. 4th, 1958), and all other widow's bonus cases.

Congress has shown its intention for a corporation to be able to give a gift, as is stated in §§ 23 (q) and 101 of the

1939 Code; §§ 170 and 501 of the 1954 Code which provides an exemption for charitable deductions made by corporations.

A corporation, being an artficial being is not capable of feeling, which includes love and affection; this is true even when it makes a charitable gift as provided for in the statute. The only reason which a corporation may have for making such a charitable gift then is for a business reason. Since Congress has provided that a corporation may make a charitable gift, and a corporation can only have business reasons for so acting, *a fortiori*, Congress has shown that a business motive is a valid motive for a corporation making a gift.

Even if Berman did consider the information as commercially valuable, the conclusion is nevertheless the same, it makes no difference what he thought. The manner in which he treats an item is in no way binding upon Duberstein. The donor's and the donee's treatment of an item are mutually exclusive as far as the tax laws are concefned. For practical purposes, one taxpayer has no way of knowing how another treats an item on his tax return.

According to the Ways and Means Committee Report of the House of Representatives, *supra*, Congress in no way intended that if there is a gift by donor there must be a gift to the donee. It is a quite common situation where there is a gift by the donor and taxable income to the donee. The reason for this is because of the definition of "gift" which is included in the gift tax laws.

If Congress intended mutually exclusive definitions of "gifts" in the gift tax law and the gift exclusion from income, there is no reason to believe that Congress did *not* intend that there also be mutually exclusive definitions of "gifts" in the gift exclusion from income, and the use of the item as a deductible expense by the donor.

The motive of one party then can have no binding force and effect on the other party for the above and following reasons: (1) Congressional intent is otherwise; (2) Any changes in the definition of the word gift would actually change the word itself and this would introduce a new exclusion into the code other than "gift," and this can only be done by Congress; (3) The word "motive" is too nebulous for any courts or agency to adjudicate from, and who is to determine which motives are valid and which ones are invalid in order to create a valid gift?

CONCLUSION

Therefore, for the foregoing reasons, the decision of the Court of Appeals for the Sixth Circuit should be affirmed.

Respectfully submitted,

SIDNEY G. KUSWORM,
403 Keith Building,
Dayton, Ohio,
Counsel for Respondents.

Of Counsel:
JACOB A. MYERS,
403 Keith Building,
Dayton, Ohio.

SUPREME COURT OF THE UNITED STATES

Nos. 376 AND 546.—OCTOBER TERM, 1959.

Commissioner of Internal Revenue, Petitioner, 376 v. Mose Duberstein, et al.	On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.
Alden D. Stanton, et al., Petitioners, 546 v. United States of America.	On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[June 13, 1960.]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

These two cases concern the provision of the Internal Revenue Code which excludes from the gross income of an income taxpayer "the value of property acquired by gift."[1] They pose the frequently recurrent question whether a specific transfer to a taxpayer in fact amounted to a "gift" to him within the meaning of the statute. The importance to decision of the facts of the cases requires that we state them in some detail.

No. 376, *Commissioner* v. *Duberstein*. The taxpayer, Duberstein,[2] was president of the Duberstein Iron & Metal Company, a corporation with headquarters in Dayton, Ohio. For some years the taxpayer's company had done business with Mohawk Metal Corporation, whose headquarters were in New York City. The president of Mohawk was one Berman. The taxpayer and

[1] The operative provision in the cases at bar is § 22 (b)(3) of the 1939 Internal Revenue Code. The corresponding provision of the present Code is § 102 (a).

[2] In both cases the husband will be referred to as the taxpayer although his wife joined with him in joint tax returns.

Berman had generally used the telephone to transact their companies' business with each other, which consisted of buying and selling metals. The taxpayer testified, without elaboration, that he knew Berman "personally" and had known him for about seven years. From time to time in their telephone conversations, Berman would ask Duberstein whether the latter knew of potential customers for some of Mohawk's products in which Duberstein's company itself was not interested. Duberstein provided the names of potential customers for these items.

One day in 1951 Berman telephoned Duberstein and said that the information Duberstein had given him had proved so helpful that he wanted to give the latter a present. Duberstein stated that Berman owed him nothing. Berman said that he had a Cadillac as a gift for Duberstein, and that the latter should send to New York for it; Berman insisted that Duberstein accept the car, and the latter finally did so, protesting however that he had not intended to be compensated for the information. At the time Duberstein already had a Cadillac and an Oldsmobile, and felt that he did not need another car. Duberstein testified that he did not think Berman would have sent him the Cadillac if he had not furnished him with information about the customers. It appeared that Mohawk later deducted the value of the Cadillac as a business expense on its corporate income tax return.

Duberstein did not include the value of the Cadillac in gross income for 1951, deeming it a gift. The Commissioner asserted a deficiency for the car's value against him, and in proceedings to review the deficiency the Tax Court affirmed the Commissioner's determination. It said that "The record is significantly barren of evidence revealing any intention on the part of the payor to make a gift. . . . The only justifiable inference is that the automobile was intended by the payor to be remuneration

for services rendered to it by Duberstein." The Court of Appeals for the Sixth Circuit reversed. 265 F. 2d 28.

No. 546, *Stanton* v. *United States*. The taxpayer Stanton had been for approximately 10 years in the employ of Trinity Church in New York City. He was comptroller of the Church corporation, and president of a corporation the church set up as a fully owned subsidiary, Trinity Operating Company, to manage its real estate holdings, which were more extensive than simply the church property. His salary by the end of his employment there in 1942 amounted to $22,500 a year. Effective November 30, 1942, he resigned from both positions to go into business for himself. The Operating Company's directors, who seem to have included the rector and vestrymen of the church, passed the following resolution upon his resignation: "Be it resolved that in appreciation of the services rendered by Mr. Stanton . . . a gratuity is hereby awarded to him of Twenty Thousand Dollars, payable to him in equal instalments of Two Thousand Dollars at the end of each and every month commencing with the month of December, 1942; provided that, with the discontinuance of his services, the Corporation of Trinity Church is released from all rights and claims to pension and retirement benefits not already accrued up to November 30, 1942."

The Operating Company's action was later explained by one of its directors as based on the fact that, "Mr. Stanton was liked by all of the Vestry personally. He had a pleasing personality. He had come in when Trinity's affairs were in a difficult situation. He did a splendid piece of work, we felt. Besides that . . . he was liked by all of the members of the Vestry personally." And by another: "[W]e were all unanimous in wishing to make Mr. Stanton a gift. Mr. Stanton had loyally and faithfully served Trinity in a very difficult time. We thought of him in the highest regard. We understood

that he was going in business for himself. We felt that he was entitled to that evidence of good will."

On the other hand, there was a suggestion of some ill-feeling between Stanton and the directors, arising out of the recent termination of the services of one Watkins, the Operating Company's treasurer, whose departure was evidently attended by some acrimony. At a special board meeting on October 28, 1942, Stanton had intervened on Watkins' side and asked reconsideration of the matter. The minutes reflect that "resentment was expressed as to the 'presumptuous' suggestion that the action of the Board, taken after long deliberation, should be changed." The Board adhered to its determination that Watkins be separated from employment, giving him an opportunity to resign rather than be discharged. At another special meeting two days later it was revealed that Watkins had not resigned; the previous resolution terminating his services was then viewed as effective; and the Board voted the payment of six months' salary to Watkins in a resolution similar to that quoted in regard to Stanton, but which did not use the term "gratuity." At the meeting, Stanton announced that in order to avoid any such embarrassment or question at any time as to his willingness to resign if the Board desired, he was tendering his resignation. It was tabled, though not without dissent. The next week, on November 5, at another special meeting, Stanton again tendered his resignation which this time was accepted.

The "gratuity" was duly paid. So was a smaller one to Stanton's (and the Operating Company's) secretary, under a similar resolution, upon her resignation at the same time. The two corporations shared the expense of the payments. There was undisputed testimony that there were in fact no enforceable rights or claims to pension and retirement benefits which had not accrued at the time of the taxpayer's resignation, and that the last

proviso of the resolution was inserted simply out of an abundance of caution. The taxpayer received in cash a refund of his contributions to the retirement plans, and there is no suggestion that he was entitled to more. He was required to perform no further services for Trinity after his resignation.

The Commissioner asserted a deficiency against the taxpayer after the latter had failed to include the payments in question in gross income. After payment of the deficiency and administrative rejection of a refund claim, the taxpayer sued the United States for a refund in the District Court for the Eastern District of New York. The trial judge, sitting without a jury, made the simple finding that the payments were a "gift," [3] and judgment was entered for the taxpayer. The Court of Appeals for the Second Circuit reversed. 268 F. 2d 727.

The Government, urging that clarification of the problem typified by these two cases was necessary, and that the approaches taken by the Courts of Appeals for the Second and the Sixth Circuits were in conflict, petitioned for certiorari in No. 376, and acquiesced in the taxpayer's petition in No. 546. On this basis, and because of the importance of the question in the administration of the income tax laws, we granted certiorari in both cases. 361 U. S. 923.

The exclusion of property acquired by gift from gross income under the federal income tax laws was made in the first income tax statute [4] passed under the authority of the Sixteenth Amendment, and has been a feature of the income tax statutes ever since. The meaning of the term "gift" as applied to particular transfers has always been a matter of contention.[5] Specific and illuminating

[3] See note 14, *infra*.

[4] § II.B., c. 16, 38 Stat. 167.

[5] The first case of the Board of Tax Appeals officially reported in fact deals with the problem. *Parrott* v. *Commissioner*, 1 B. T. A. 1.

legislative history on the point does not appear to exist. Analogies and inferences drawn from other revenue provisions, such as the estate and gift taxes, are dubious. See *Lockard* v. *Commissioner*, 166 F. 2d 409. The meaning of the statutory term has been shaped largely by the decisional law. With this, we turn to the contentions made by the Government in these cases.

First. The Government suggests that we promulgate a new "test" in this area to serve as a standard to be applied by the lower courts and by the Tax Court in dealing with the numerous cases that arise.[6] We reject this invitation. We are of opinion that the governing principles are necessarily general and have already been spelled out in the opinions of this Court, and that the problem is one which, under the present statutory framework, does not lend itself to any more definitive statement that would produce a talisman for the solution of concrete cases. The cases at bar are fair examples of the settings in which the problem usually arises. They present situations in which payments have been made in a context with business overtones—an employer making a payment to a retiring employee; a businessman giving something of value to another businessman who has been of advantage to him in his business. In this context, we review the law as established by the prior cases here.

The course of decision here makes it plain that the statute does not use the term "gift" in the common-law sense, but in a more colloquial sense. This Court has indicated that a voluntary executed transfer of his property by one to another, without any consideration or compensation therefor, though a common-law gift, is not necessarily a "gift" within the meaning of the statute. For the Court has shown that the mere absence of a

[6] The Government's proposed test is stated: "Gifts should be defined as transfers of property made for personal as distinguished from business reasons."

legal or moral obligation to make such a payment does not establish that it is a gift. *Old Colony Trust Co.* v. *Commissioner*, 279 U. S. 716, 730. And, importantly, if the payment proceeds primarily from "the constraining force of any moral or legal duty," or from "the incentive of anticipated benefit" of an economic nature, *Bogardus* v. *Commissioner*, 302 U. S. 34, 41, it is not a gift. And, conversely, "[w]here the payment is in return for services rendered, it is irrelevant that the donor derives no economic benefit from it." *Robertson* v. *United States*, 343 U. S. 711, 714.[3] A gift in the statutory sense, on the other hand, proceeds from a "detached and disinterested generosity," *Commissioner* v. *LoBue*, 351 U. S. 243, 246; "out of affection, respect, admiration, charity or like impulses." *Robertson* v. *United States*, *supra*, at 714. And in this regard, the most critical consideration, as the Court was agreed in the leading case here, is the transferor's "intention." *Bogardus* v. *Commissioner*, 302 U. S. 34, 43. "What controls is the intention with which payment, however voluntary, has been made." *Id.*, at 45 (dissenting opinion).[4]

The Government says that this "intention" of the transferor cannot mean what the cases on the common-

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[3] The cases including "tips" in gross income are classic examples of this. See, *e. g.*, *Roberts* v. *Commissioner*, 176 F. 2d 221.

[4] The parts of the *Bogardus* opinion which we touch on here are the ones we take to be basic to its holding, and the ones that we read as stating those governing principles which it establishes. As to them we see little distinction between the views of the Court and those taken in dissent in *Bogardus*. The fear expressed by the dissent at 302 U. S., at 44, that the prevailing opinion "seems" to hold "that every payment which in any aspect is a gift is . . . relieved of any tax" strikes us now as going beyond what the opinion of the Court held in fact. In any event, the Court's opinion in *Bogardus* does not seem to have been so interpreted afterwards. The principal difference, as we see it, between the Court's opinion and the dissent lies in the weight to be given the findings of the trier of fact.

law concept of gift call "donative intent." With that we are in agreement, for our decisions fully support this. Moreover, the *Bogardus* case itself makes it plain that the donor's characterization of his action is not determinative—that there must be an objective inquiry as to whether what is called a gift amounts to it in reality. 302 U. S., at 40. It scarcely needs adding that the parties' expectations or hopes as to the tax treatment of their conduct in themselves have nothing to do with the matter.

It is suggested that the *Bogardus* criterion would be more apt if rephrased in terms of "motive" rather than "intention." We must confess to some skepticism as to whether such a verbal mutation would be of any practical consequence. We take it that the proper criterion, established by decision here, is one that inquires what the basic reason for his conduct was in fact—the dominant reason that explains his action in making the transfer. Further than that we do not think it profitable to go.

Second. The Government's proposed "test," while apparently simple and precise in its formulation, depends frankly on a set of "principles" or "presumptions" derived from the decided cases, and concededly subject to various exceptions; and it involves various corollaries, which add to its detail. Were we to promulgate this test as a matter of law, and accept with it its various presuppositions and stated consequences, we would be passing far beyond the requirements of the cases before us, and would be painting on a large canvas with indeed a broad brush. The Government derives its test from such propositions as the following: That payments by an employer to an employee, even though voluntary, ought, by and large, to be taxable; That the concept of a gift is inconsistent with a payment's being a deductible business expense; That a gift involves "personal" elements; That a business corporation cannot properly make a gift of its assets. The

Government admits that there are exceptions and qualifications to these propositions. We think, to the extent they are correct, that these propositions are not principles of law but rather maxims of experience that the tribunals which have tried the facts of cases in this area have enunciated in explaining their factual determinations. Some of them simply represent truisms: it doubtless is, statistically speaking, the exceptional payment by an employer to an employee that amounts to a gift. Others are overstatements of possible evidentiary inferences relevant to a factual determination on the totality of circumstances in the case: it is doubtless relevant to the over-all inference that the transferor treats a payment as a business deduction, or that the transferor is a corporate entity. But these inferences cannot be stated in absolute terms. Neither factor is a shibboleth. The taxing statute does not make nondeductibility by the transferor a condition on the "gift" exclusion; nor does it draw any distinction, in terms, between transfers by corporations and individuals, as to the availability of the "gift" exclusion to the transferee. The conclusion whether a transfer amounts to a "gift" is one that must be reached on consideration of all the factors.

Specifically, the trier of fact must be careful not to allow trial of the issue whether the receipt of a specific payment is a gift to turn into a trial of the tax liability, or of the propriety, as a matter of fiduciary or corporate law, attaching to the conduct of someone else. The major corollary to the Government's suggested "test" is that, as an ordinary matter, a payment by a corporation cannot be a gift, and, more specifically, there can be no such thing as a "gift" made by a corporation which would allow it to take a deduction for an ordinary and necessary business expense. As we have said, we find no basis for such a conclusion in the statute; and if it were applied as a determinative rule of "law," it would force the tribunals

trying tax cases involving the donee's liability into elaborate inquiries into the local law of corporations or into the peripheral deductibility of payments as business expenses. The former issue might make the tax tribunals the most frequent investigators of an important and difficult issue of the laws of the several States, and the latter inquiry would summon one difficult and delicate problem of federal tax law as an aid to the solution of another.[9] Or perhaps there would be required a trial of the vexed issue whether there was a "constructive" distribution of corporate property, for income tax purposes, to the corporate agents who had sponsored the transfer.[10] These considerations, also, reinforce us in our conclusion that while the principles urged by the Government may, in nonabsolute form as crystallizations of experience, prove persuasive to the trier of facts in a particular case, neither they, nor any more detailed statement than has been made, can be laid down as a matter of law.

Third. Decision of the issue presented in these cases must be based ultimately on the application of the fact-finding tribunal's experience with the mainsprings of human conduct to the totality of the facts of each case. The nontechnical nature of the stautory standard, the close relationship of it to the data of practical human experience, and the multiplicity of relevant factual elements, with their various combinations, creating the

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[9] Justice Cardozo once described in memorable language the inquiry into whether an expense was an "ordinary and necessary" one of a business: "One struggles in vain for any verbal formula that will supply a ready touchstone. The standard set up by the statute is not a rule of law; it is rather a way of life. Life in all its fullness must supply the answer to the riddle." *Welch* v. *Helvering*, 290 U. S. 111, 115. The same comment well fits the issue in the cases at bar.

[10] Cf., *e. g.*, *Nelson* v. *Commissioner*, 203 F. 2d 1.

necessity of ascribing the proper force to each, confirm us in our conclusion that primary weight in this area must be given to the conclusions of the trier of fact. *Baker* v. *Texas & Pacific R. Co.*, 359 U. S. 227; *Commissioner* v. *Heininger*, 320 U. S. 467, 475; *United States* v. *Yellow Cab Co.*, 338 U. S. 338, 341; *Bogardus* v. *Commissioner*, *supra*, at 45 (dissenting opinion).[11]

This conclusion may not satisfy an academic desire for tidiness, symmetry and precision in this area, any more than a system based on the determinations of various fact-finders ordinarily does. But we see it as implicit in the present statutory treatment of the exclusion for gifts, and in the variety of forums in which federal income tax cases can be tried. If there is fear of undue uncertainty or overmuch litigation, Congress may make more precise its treatment of the matter by singling out certain

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[11] In *Bogardus*, the Court was divided 5 to 4 as to the scope of review to be extended the fact-finder's determination as to a specific receipt, in a context like that of the instant cases. The majority held that such a determination was "a conclusion of law or at least a determination of a mixed question of law and fact." 302 U. S., at 39. This formulation it took as justifying it in assuming a fairly broad standard of review. The dissent took a contrary view. The approach of this part of the Court's ruling in *Bogardus*, which we think was the only part on which there was real division among the Court, see note 8, *supra*, has not been afforded subsequent respect here. In *Heininger*, a question presenting at the most elements no more factual and untechnical than those here—that of the "ordinary and necessary" nature of a business expense—was treated as one of fact. Cf. note 9, *supra*. And in *Dobson* v. *Commissioner*, 320 U. S. 489, 498, n. 22, *Bogardus* was adversely criticized, insofar as it treated the matter as reviewable as one of law. While *Dobson* is, of course, no longer the law insofar as it ordains a greater weight to be attached to the findings of the Tax Court than to those of any other fact-finder in a tax litigation, see note 13, *infra*, we think its criticism of this point in the *Bogardus* opinion is sound in view of the dominant importance of factual inquiry to decision of these cases.

factors and making them determinative of the matter, as it has done in one field of the "gift" exclusion's former application, that of prizes and awards.[12] Doubtless diversity of result will tend to be lessened somewhat since federal income tax decisions, even those in tribunals of first instance turning on issues of fact, tend to be reported, and since there may be a natural tendency of professional triers of fact to follow one another's determinations, even as to factual matters. But the question here remains basically one of fact, for determination on a case-by-case basis.

One consequence of this is that appellate review of determinations in this field must be quite restricted. Where a jury has tried the matter upon correct instructions, the only inquiry is whether it cannot be said that reasonable men could reach differing conclusions on the issue. *Baker* v. *Texas & Pacific R. Co.*, *supra*, at 228. Where the trial has been by a judge without a jury, the judge's findings must stand unless "clearly erroneous." Fed. Rules Civ. Proc., 52 (a). "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States* v. *United States Gypsum Co.*, 333 U. S. 364, 395. The rule itself applies also to factual inferences from undisputed basic facts, *id.*, at 394, as will on many occasions be presented in this area. Cf. *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.*, 339

[12] I. R. C., § 74, which is a provision new with the 1954 Code. Previously, there had been holdings that such receipts as the "Pot O'Gold" radio giveaway, *Washburn* v. *Commissioner*, 5 T. C. 1333, and the Ross Essay Prize, *McDermott* v. *Commissioner*, 80 U. S. App. D. C. 176, 150 F. 2d 585, were "gifts." Congress intended to obviate such rulings. S. Rep. No. 1622, 83d Cong., 2d Sess., p. 178. We imply no approval of those holdings under the general standard of the "gift" exclusion. Cf. *Robertson* v. *United States*, *supra*.

U. S. 605, 609–610. And Congress has in the most explicit terms attached the identical weight to the findings of the Tax Court. I. R. C., § 7482 (a).[13]

Fourth. A majority of the Court is in accord with the principles just outlined. And, applying them to the *Duberstein* case, we are in agreement, on the evidence we have set forth, that it cannot be said that the conclusion of the Tax Court was "clearly erroneous." It seems to us plain that as trier of the facts it was warranted in concluding that despite the characterization of the transfer of the Cadillac by the parties and the absence of any obligation, even of a moral nature, to make it, it was at bottom a recompense for Duberstein's past services, or an inducement for him to be of further service in the future. We cannot say with the Court of Appeals that such a conclusion was "mere suspicion" on the Tax Court's part. To us it appears based in the sort of informed experience with human affairs that fact-finding tribunals should bring to this task.

As to *Stanton*, we are in disagreement. To four of us, it is critical here that the District Court as trier of fact made only the simple and unelaborated finding that the transfer in question was a "gift."[14] To be sure, concise-

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[13] "The United States Courts of Appeals shall have exclusive jurisdiction to review the decisions of the Tax Court . . . in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury. . . ." The last words first came into the statute through an amendment to § 1141 (a) of the 1939 Code in 1948 (§ 36 of the Judicial Code Act, 62 Stat. 991). The purpose of the 1948 legislation was to remove from the law the favored position (in comparison with District Court and Court of Claims rulings in tax matters) enjoyed by the Tax Court under this Court's ruling in *Dobson v. Commissioner*, 320 U. S. 489. Cf. note 11, *supra*. See *Grace Bros., Inc., v. Commissioner*, 173 F. 2d 170, 173.

[14] The "Findings of Fact and Conclusions of Law" were made orally, and were simply: "The Resolution of the Board of Directors

ness is to be strived for, and prolixity avoided, in findings; but, to the four of us, there comes a point where findings become so sparse and conclusory as to give no revelation of what the District Court's concept of the determining facts and legal standard may be. See *Matton Oil Transfer Corp.* v. *The Dynamic*, 123 F. 2d 999, 1000–1001. Such conclusory, general findings do not constitute compliance with Rule 52's direction to "find the facts specially and state separately . . . conclusions of law thereon." While the standard of law in this area is not a complex one, we four think the unelaborated finding of ultimate fact here cannot stand as a fulfillment of these requirements. It affords the reviewing court not the semblance of an indication of the legal standard with which the trier of fact has approached his task. For all that appears, the District Court may have viewed the form of the resolution or the simple absence of legal consideration as conclusive. While the judgment of the Court of Appeals cannot stand, the four of us think there must be further proceedings in the District Court looking toward new and adequate findings of fact. In this, we are joined by MR. JUSTICE WHITTAKER, who agrees that the findings were inadequate, although he does not concur generally in this opinion.

Accordingly, in No. 376, the judgment of this Court is that the judgment of the Court of Appeals is reversed.

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of the Trinity Operating Company, Incorporated, held November 18, 1942, after the resignations had been accepted of the plaintiff from his positions as controller of the corporation of the Trinity Church, and the president of the Trinity Operating Company, Incorporated, whereby a gratuity was voted to the plaintiff, Allen [*sic*] D. Stanton, in the amount of $2,000 payable to him in monthly installments of $2,000 each, commencing with the month of December, 1942, constituted a gift to the taxpayer, and therefore need not have been reported by him as income for the taxable years 1942, or 1943."

and in No. 546, that the judgment of the Court of Appeals is vacated, and the case is remanded to the District Court for further proceedings not inconsistent with this opinion.

It is so ordered.

MR. JUSTICE HARLAN concurs in the result in No. 376. In No. 546, he would affirm the judgment of the Court of Appeals for the reasons stated by MR. JUSTICE FRANKFURTER.

MR. JUSTICE WHITTAKER, agreeing with *Bogardus* that whether a particular transfer is or is not a "gift" may involve "a mixed question of law and fact," 302 U. S., at 39, concurs only in the result of this opinion.

MR. JUSTICE DOUGLAS dissents, since he is of the view that in each of these two cases there was a gift under the test which the Court fashioned nearly a quarter of a century ago in *Bogardus* v. *Commissioner*, 302 U. S. 34.

SUPREME COURT OF THE UNITED STATES

Nos. 376 AND 546.—OCTOBER TERM, 1959.

Commissioner of Internal Revenue, Petitioner, 376 v. Mose Duberstein, et al.	On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.
Alden D. Stanton, et al., Petitioners, 546 v. United States of America.	On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[June 13, 1960.]

MR. JUSTICE BLACK, concurring and dissenting.

I agree with the Court that it was not clearly erroneous for the Tax Court to find as it did in No. 376 that the automobile transfer to Duberstein was not a gift, and so I agree with the Court's opinion and judgment reversing the judgment of the Court of Appeals in that case.

I dissent in No. 546, *Stanton* v. *United States*. The District Court found that the $20,000 transferred to Mr. Stanton by his former employer at the end of ten years' service was a gift and therefore exempt from taxation under I. R. C. of 1939, § 22 (b)(3) (now I. R. C. of 1954, § 102 (a)). I think the finding was not clearly erroneous and that the Court of Appeals was therefore wrong in reversing the District Court's judgment. While conflicting inferences might have been drawn, there was evidence to show that Mr. Stanton's long services had been satisfactory, that he was well-liked personally and had given splendid service, that the employer was under no obligation at all to pay any added compensation, but made the $20,000 payment because prompted by a genuine desire to make him a "gift," to award him a "gratuity." Cf.

Commissioner v. *LoBue*, 351 U. S. 243, 246–247. The District Court's finding was that the added payment "constituted a gift to the taxpayer, and therefore need not have been reported by him as income . . . ." The trial court might have used more words, or discussed the facts set out above in more detail, but I doubt if this would have made its crucial, adequately supported finding any clearer. For this reason I would reinstate the District Court's judgment for petitioner.

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[June 13, 1960.]

MR. JUSTICE FRANKFURTER concurring in the judgment in No. 376 and dissenting in No. 546.

As the Court's opinion indicates, we brought these two cases here partly because of a claimed difference in the approaches between two Courts of Appeals but primarily on the Government's urging that, in the interest of the better administration of the income tax laws, clarification was desirable for determining when a transfer of property constitutes a "gift" and is not to be included in income for purposes of ascertaining the "gross income" under the Internal Revenue Code. As soon as this problem emerged after the imposition of the first income tax authorized by the Sixteenth Amendment, it became evident that its inherent difficulties and subtleties would not easily yield to the formulation of a general rule or test sufficiently definite to confine within narrow limits the area of judgment in applying it. While at its core the tax conception of a gift no doubt reflected the non-legal, non-technical notion of a benefaction unentangled with any aspect of worldly requital, the divers blends of personal and pecuniary relationships in our industrial society

inevitably presented niceties for adjudication which could not be put to rest by any kind of general formulation.

Despite acute arguments at the bar and a most thorough re-examination of the problem on a full canvass of our prior decisions and an attempted fresh analysis of the nature of the problem, the Court has rejected the invitation of the Government to fashion anything like a litmus paper test for determining what is excludable as a "gift" from gross income. Nor has the Court attempted a clarification of the particular aspects of the problem presented by these two cases, namely, payment by an employer to an employee upon the termination of the employment relation and non-obligatory payment for services rendered in the course of a business relationship. While I agree that experience has shown the futility of attempting to define, by language so circumscribing as to make it easily applicable, what constitutes a gift for every situation where the problem may arise, I do think that greater explicitness is possible in isolating and emphasizing factors which militate against a gift in particular situations.

Thus, regarding the two frequently recurring situations involved in these cases—things of value given to employees by their employers upon the termination of employment and payments entangled in a business relation and occasioned by the performance of some service—the strong implication is that the payment is of a business nature. The problem in these two cases is entirely different from the problem in a case where a payment is made from one member of a family to another, where the implications are directly otherwise. No single general formulation appropriately deals with both types of cases, although both involve the question whether the payment was a "gift." While we should normally suppose that a payment from father to son was a gift, unless the contrary

is shown, in the two situations now before us the business implications are so forceful that I would apply a presumptive rule placing the burden upon the beneficiary to prove the payment wholly unrelated to his services to the enterprise. The Court, however, has declined so to analyze the problem and has concluded "that the governing principles are necessarily general and have already been spelled out in the opinions of this Court, and that the problem is one which, under the present statutory framework, does not lend itself to any more definitive statement that would produce a talisman for the solution of concrete cases."

The Court has made only one authoritative addition to the previous course of our decisions. Recognizing *Bogardus* v. *Commissioner*, 302 U. S. 34, as "the leading case here" and finding essential accord between the Court's opinion and the dissent in that case, the Court has drawn from the dissent in *Bogardus* for infusion into what will now be a controlling qualification, recognition that it is "for the triers of the facts to seek among competing aims or motives the ones that dominated conduct." 302 U. S. 34, 45 (dissenting opinion). All this being so in view of the Court, it seems to me desirable not to try to improve what has "already been spelled out" in the opinions of this Court but to leave to the lower courts the application of old phrases rather than to float new ones and thereby inevitably produce a new volume of exegesis on the new phrases.

Especially do I believe this when fact-finding tribunals are directed by the Court to rely upon their "experience with the mainsprings of human conduct" and on their "informed experience with human affairs" in appraising the totality of the facts of each case. Varying conceptions regarding the "mainsprings of human conduct" are derived from a variety of experiences or assumptions about the nature of man, and "experience with human

affairs," is not only diverse but often drastically conflicting. What the Court now does sets fact-finding bodies to sail on an illimitable ocean of individual beliefs and experiences. This can hardly fail to invite, if indeed not encourage, too individualized diversities in the administration of the income tax law. I am afraid that by these new phrasings the practicalities of tax administration, which should be as uniform as is possible in so vast a country as ours, will be embarrassed. By applying what has already been spelled out in the opinions of this Court, I agree with the Court in reversing the judgment in *Commissioner of Internal Revenue* v. *Duberstein*.

But I would affirm the decision of the Court of Appeals for the Second Circuit in *Stanton* v. *United States*. I would do so on the basis of the opinion of Judge Hand and more particularly because the very terms of the resolution by which the $20,000 was awarded to Stanton indicated that it was not a "gratuity" in the sense of sheer benevolence but in the nature of a generous lagniappe, something extra thrown in for services received though not legally nor morally required to be given. This careful resolution, doubtless drawn by a lawyer and adopted by some hardheaded businessmen, contained a proviso that Stanton should abandon all rights to "pension and retirement benefits." The fact that Stanton had no such claims does not lessen the significance of the clause as something "to make assurance doubly sure." 268 F. 2d 728. The business nature of the payment is confirmed by the words of the resolution, explaining the "gratuity" as "in appreciation of the services rendered by Mr. Stanton as Manager of the Estate and Comptroller of the Corporation of Trinity Church throughout nearly ten years, and as President of Trinity Operating Company, Inc." The force of this document, in light of all the factors to which Judge Hand adverted in his opinion, was not in the least diminished by testimony at the trial. Thus

the taxpayer has totally failed to sustain the burden I would place upon him to establish that the payment to him was wholly attributable to generosity unrelated to his performance of his secular business functions as an officer of the corporation of the Trinity Church of New York and the Trinity Operating Co. Since the record totally fails to establish taxpayer's claim, I see no need of specific findings by the trial judge.